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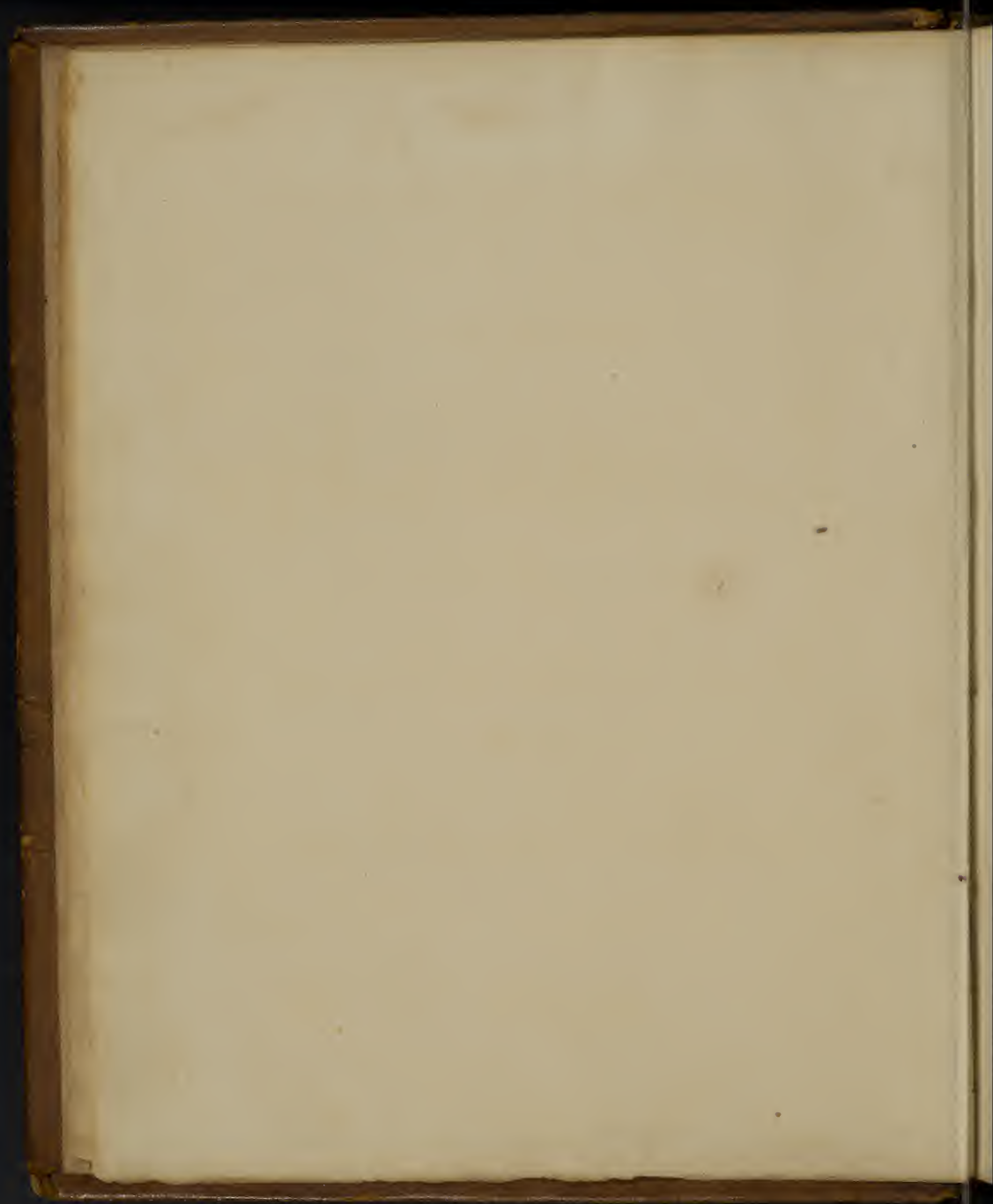
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1870

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LECTURES ON

BY

Wm. T. W. W. W.

AND

Wm. T. W. W.

Wm. T. W. W.

1823

W. LARSON, II

is

of the Town of

and

of the County of

State of

1884

LECTURES ON LAW

BY

HON. TAPPING REEVE ,

AND

JAMES GOULD ESQ

LITCHFIELD.

1812-3

History of the County

of Lincoln

THE HISTORY OF THE COUNTY

OF

LINCOLN

BY

JAMES HARRISON

LONDON

1812

REEVES AND GOULDS

LECTURES

IN SIX VOLUMES ~

VOLUME II

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MUNICIPAL LAW

BARON AND FEME.

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MASTER AND SERVANT

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by John Smith

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London

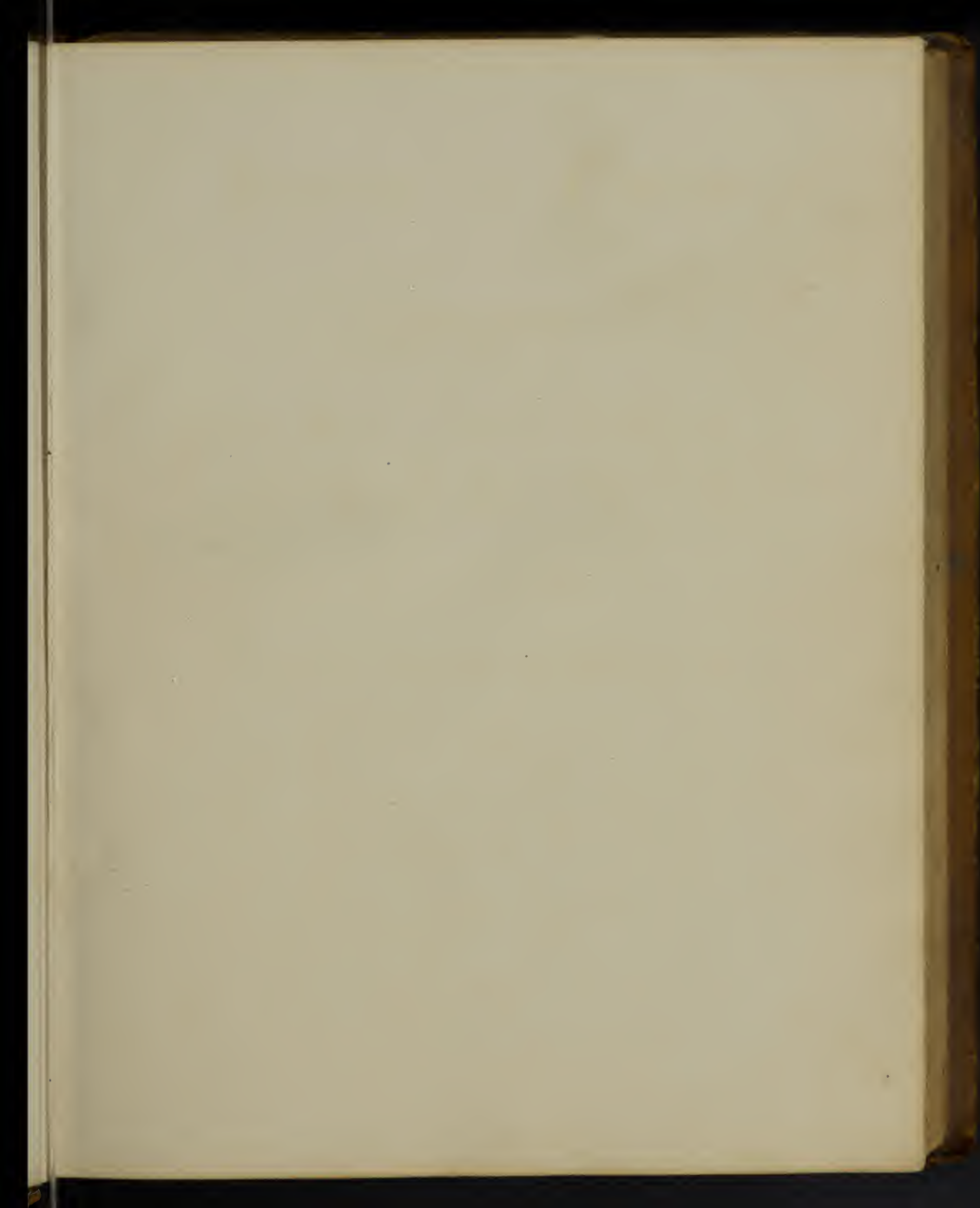
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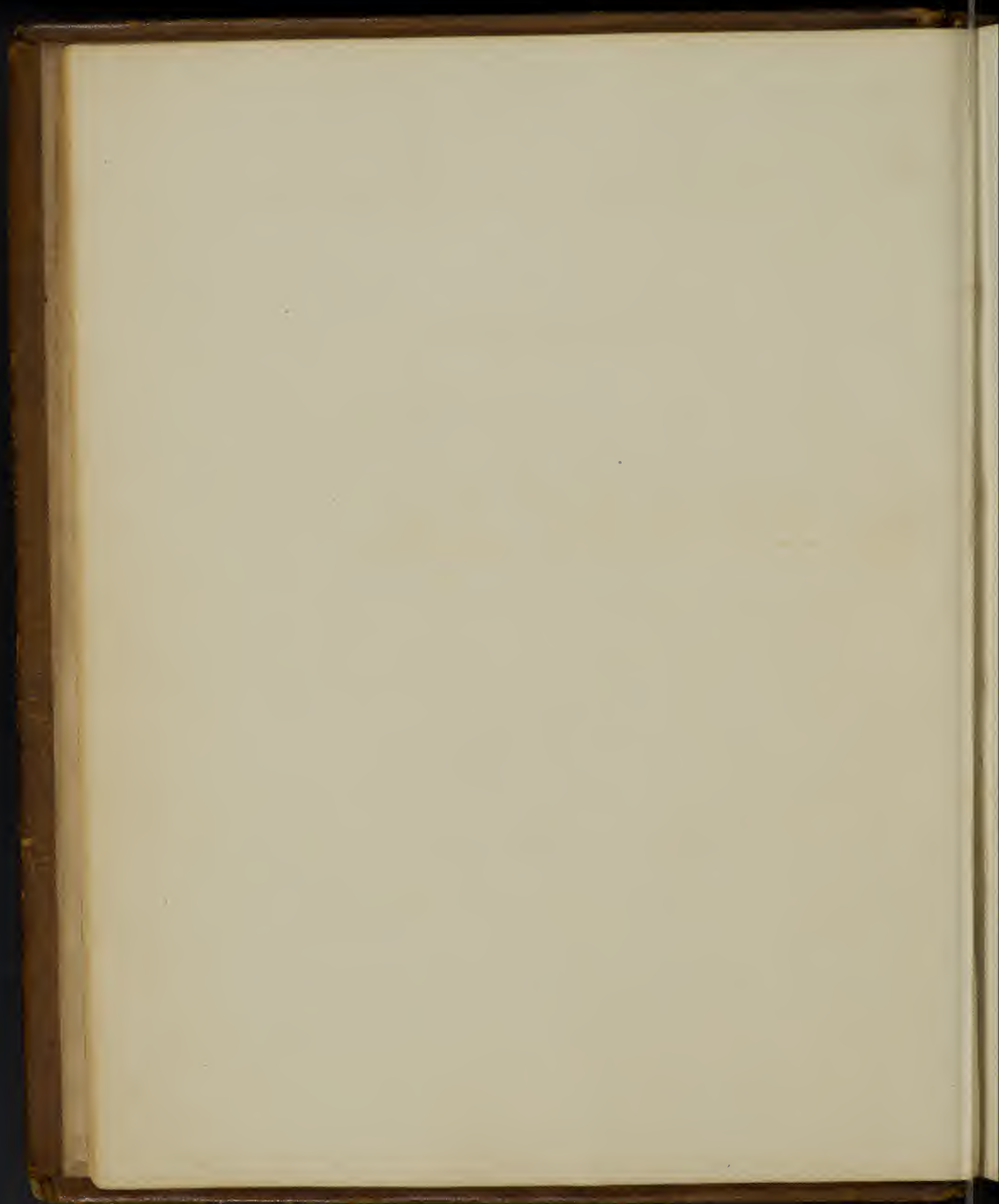
at the Sign of the

Golden Lion

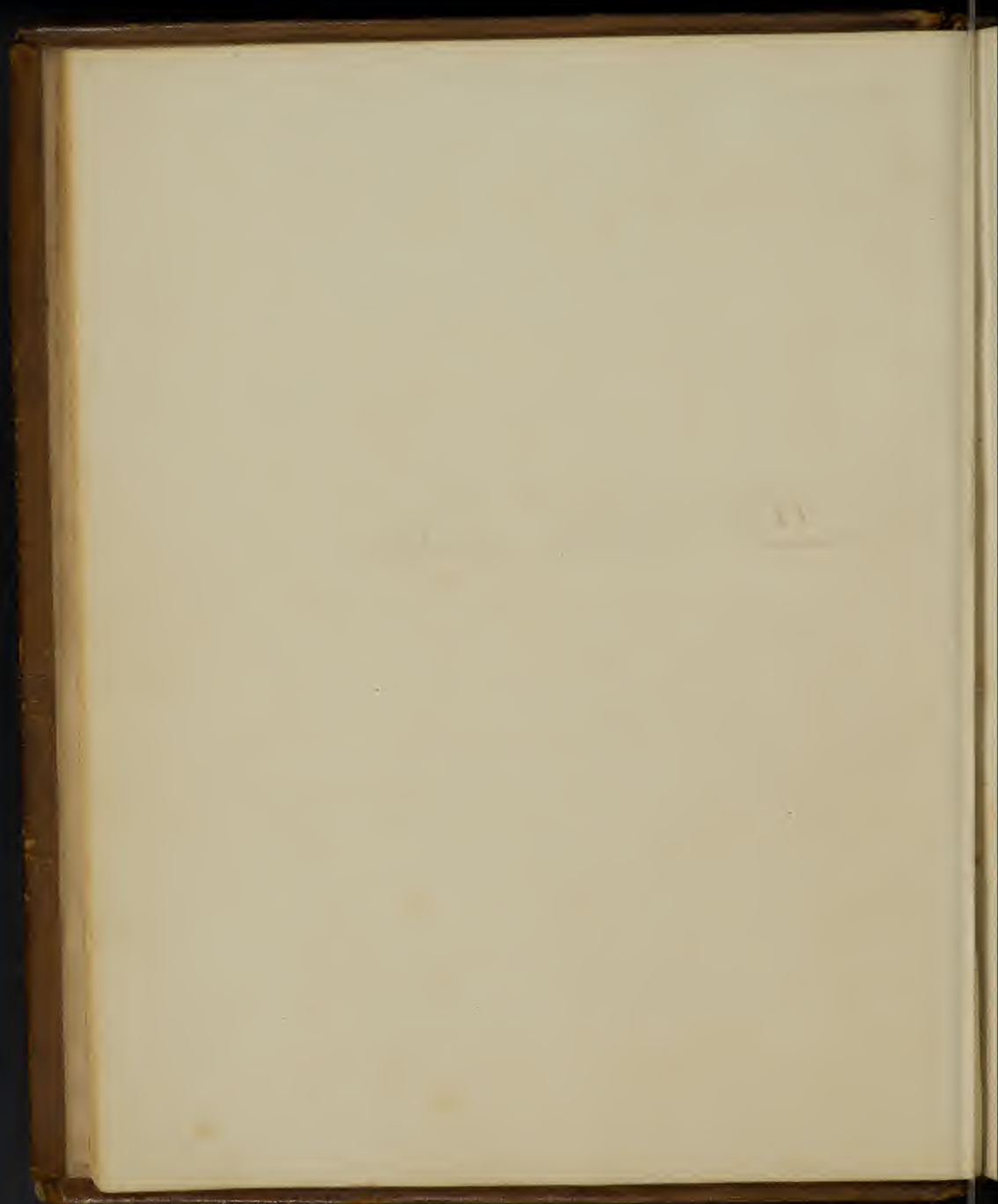
in St. Pauls Church-yard

1791





Municipal Law



1

Municipal Law. by
J Gould Esq. D
P J 1812

Law in its most extensive and Genl sense is a rule of action or conduct.

Municipal Law is defined to be "a Rule of Civil Conduct prescribed by the Supreme power in a State commanding what is right and prohibiting what is wrong" —

In point of fact indeed the Law may not command what is right or prohibit what is wrong. Every Judge must enforce the Law as right — the rule is to be understood only in reference to the contemplation of the Good itself or those who enforce it.

It is a "rule" and it is said to be "permanent uniform and universal."

It must be "permanent" not that every Law must be "perpetual," only that it must not be suspended in its Operation or obligation during the time for which it imports to be in force. — Now a Law may be made for only two years. But it must be "permanent" during the time for which it is enacted. D

Municipal Law

It must be "uniform" and "universal," i.e. so far as it extends it must be general and not "personal" within its own limits whatever those limits are. Thus in England there are "particular local Customs, and usages, and these are not Law so the whole Kingdom. But they are so, as far as they extend, as the Law of Town or City.

Municipal Law differs from natural Law in that the latter is a rule of moral conduct, the former of civil, this is their essential difference.

"Prescribed" i.e. the rule is to be made known before those who are to be governed by it, before they are to be affected by its operation.

There is no Law unless it have a retrospective operation. It is palpably unjust to make unlawful tomorrow an act committed today when it is lawful.

There is a difference between a retrospective and an "ex post facto" Law.

A "retroactive" is one that operates on things past. An "ex post facto" Law is a general Law that has a retrospective operation. A "retroactive" Law is a genus of which an "ex post facto" is a species. — The Constitution of U.S. prohibits all "ex post facto" but not all retroactive Laws.

This rule is to be "prescribed by the Language & Law" - which has always the power of making Laws. See Blackstones used and application of the signs to be used in the interpretation of Laws.

1st The words of the Law are going to be understood, according to their most known most usual and popular acceptation. - 1. Bac. 647
But terms of art are to be understood according to the learned acceptation of them. - 6. Mod. 143

2^d Where the words of a rule are dubious, it is well to consult the Context - and the Preamble tho. no part of the Law may be resorted to, for the same purpose. As to the Law "in pari materia" may be resorted to, to obtain the meaning of that. 1. Bac. 368
2. Bac. 200
4. Bac. 545
3. Ray. 902, 87

3^d So if a word or phrase is ambiguous it is to be understood according to the subject matter. - And when any Law may have different constructions recourse must be had to the effect and consequences. 4. Bac. 152

But the most important rule is that the reason and spirit of the Law must be consulted - this is the great Cardinal rule in all Cases. - The reason of the Law says Lord Coke, is the Law itself. Every Law is founded on some reason, and when the true reason can be come at there can be no uncertainty in the application. -

131. end^s 51 Hence arises the Equity of the Law.
 132. Hon^s 431 By the Equity of the Law, I mean such a Con-
 133. Hon^s 232 struction as is agreeable to the reason and
 134. Inst^s 24 Spirit of it. Now all the other rules are
 merely ancillary to this rule; to show what the
 reason and Spirit of the Law is; in no other
 respect are they of any use.

Municipal Law is divided into two
 kinds "viz the 'Lex non Scripta' and the
 'Lex Scripta'."

The unwritten Law includes
 the Com^{on} Law & Customs so called. 2 Particular
 135. 53-7 Customs. 3 Particular Laws observed only in
 Particular places. All these are Custom-
 ary Laws or Laws founded on Custom.

But when it is asked are they called "un-
 written" - because they are to be found in Books?

The writing in which it is found does not
 constitute the Law; its original institution is
 not set down in writing; whereas the Roll
 of Parliament is itself the Law.

This unwritten Law derives its force and
 136. 64-7 authority from immemorial usage. It
 having been received and adopted since im-
 memorial.

The first Branch Consists of what is
 called the Common Law. This is a Gen^l

Custom extending throughout the whole realm
its foundation is Custom. The time of legal
memory is dated back to the accession of Rich^d
and ~~to~~ to the English throne, and to by in
memorial a Custom must extend back
beyond his accession. This rule tho' true in
theory is incorrect in practice. A part
of the Law Merchant is Com Law. yet this
has attached since the time of Rich^d
and ~~to~~

2 Bzard 31
1 Bzard 68
2 Bzard 238
* 1189

But if C & is unwritten where is
it to be found? It is to be still found
in Books, manuscripts or Printed, in Books
of Reports, Records of Ct, Treaties, and in the
minds of the Judges. - Still it is unwritten
because the writing does not constitute the
Law. - These Reports, Records, &c. are only
evidences of C & Law. Hence modern decisions
overturn former ones. And it follows that
if the decision of a Judge itself constituted a Law
it could never be overturned by a subsequent
Judge

As in attending to the unwritten Law
you are constantly referred to precedents it is
expedient to have a correct idea of a Pre-
cedent.

A Precedent is a former judicial
decision on the point in question, and it
is only "prima facie" evidence of what the Law is.

How far is a Precedent binding? - I took
the rule to be that a precedent is always to
be followed unless it is flatly absurd or unjust.

Precedents are not to be overruled merely
because their reason could be discovered. By
a Precedent then is always the Law or rather
prima facie - evidence of the Law and the
1846 69-70. ground of "proof" lies on the party who takes
the exception to the Precedent.

1 East 498. Precedent is the very life of Customary
Law and "Stare Decisis" - is one of the
most important maxims in English
Law.

But how did this Law come into ex-
istence as it has always been immemorial?
It was built up by the Cts of Justice from
the necessity of the Case that there might
not be a failure of Justice.

However perfect a Statute Law may
be it is impossible for that alone to give
relief to the slightest injury.

How as Cts have built up the Com.
Law it has proceeded from the Sovereign Power
only as it has been presumed and sanctioned
by the Sovereign Powers.

But how can it be said to be immemorial? - Modern decisions are only taken as
evidence of what the C. L. was & always has
been.

The principles of this modern Law existed before the time of Richard 1st, as much as they do since. All the decisions on the C. L. are evidence of what those principles have always been —

2nd Particular Customs.

13 Bon 74
28. 268,

Now in enforcing these Particular Customs the mode is very different from that used in enforcing the Gen. Law.

Particular Customs must be specially pleaded and proved in the P. L. i. e. the Plea in his Declaration or Plea what the Particular Custom is as judges, as such. 13 Bon 74
Know nothing of Particular Customs. — 28. 268.
Gen. Customs need not be pleaded of their kind 13 Bon 74
The judges are bound to take notice "ex officio" and the P. L. is bound only to state those facts which will bring the Case within the rules of the C. L.

There is an exception to this Gen. Rule in the Case of Custom and Breach — English Customs — here the party need not prove that his Case comes within the Custom. — The reason may be that these Customs are notorious. & deemed important.

13 Bon 70
28. 78

The S. Merchant is very improperly
 18th 295 called a Particular Custom; it is to be
 20 310 since confined to particular Subjects but
 336-436 It extends throughout the realm to that
 120 75 Class of Subjects and is not confined to
 20 350 Particular local limits -
 40 407 Comp. 45
 20 152
 Chapp. 13

The Law Merchant need not be
 10th 125 recorded at the Bench day.

+ 20th 175 The S. M. is not like particular Custom to be tried by a Jury, and proved by Witnesses - But it is said there is an exception to this rule where new Cases arise. But I apprehend there is no more necessity of this than there is in other Cases. Let the C. S. Books and the testimony of learned or experienced men may be taken notice of & resorted to in both Cases. I trust a Judge would not at that day call in a Merchant to testify what the Principles of the Law Merchant in C. S. is, but only to prove facts or the meaning of particular words in an instrument. Let him only require a Book or Decree to explain the meaning of words in any Language in order that he may determine himself what the Principles of the Law is. Merchants can never be introduced to prove Principles of S. M. but in matters of fact only, or particular local Customs in the S. M. & C. S.

Every Custom to be good must have certain qualities. as

1st It must be immemorial.

2^d It must have been continued or uninterrupted any interruption of its exercise does not destroy it but the shortest interruption of the right does destroy it.

3^d It must have been peaceably acquiesced in.

4th It must be reasonable, or rather it must not be unreasonable. 18670-8

5th It must be certain. If it is too vague and uncertain, too much so for practical application, it must be void. 18671-4

6th It must be compulsory. These customs so far as they extend form rules of conduct & such rules are always compulsory.

7th They must be consistent with Law. — So if it is an action of nuisance, claims a right to have his windows unobstructed, and D pleads that he has a right to obstruct them when he pleases, this plea is bad.

Particular Customs in derogation of the Law are to be continued.

Strictly, i. e. they are not to be extended according to what is called the Equity of the Law 18678-9
They are not to be extended so as to include by their equity what is not included by their letter.

3rd Certain Particular Laws.

These consist of the Civil & Canon Laws

BB. 6479
D 8483 They are known and used only in certain Particulars, Civ. or jurisdiction, and in this they differ from the Com Law.

They differ from Particular Customs in that they are not confined or local in their operation, tho they are in their administration.

These Particular Laws are binding only by adoption and not because they are the Laws of Rome but having been adopted time out of mind like other Customs they are a part of the unwritten Law.

BB. 6479
D 8483

As to the English Law both Common and Stat. so far as it is binding in Court, receives its authority from Edmundo or Sanction & its immemorial usage. And so far as it is applied to this Country & where the English Law is not here absurd or unjust it is as binding in this Country as in England, and our Court are not at liberty to reject it so far as it is applied, any more than the Ct of Westminster Hall. To be sure some Titles have no application to us never were adopted and have no binding force upon us.

I think then it may be safely laid down that the C^l of England is ⁱⁿ full force.

binding here in all cases for in Gen that
system has been adopted and used as our
Law by Gen Council. -

There has been much con-
trovery Law for the C. D. of England is binding
in this State and others but it seems worth
to be settled, that it is applicable and has been
adopted and if adopted is binding whether it
just or not. P

There has also been much
Sophistry, employed to prove that we can't
in this Country have a C. D. of our own dis-
tinct or different from that of England -

So far as the C. D. of England is in ap-
plication to this Country we must have a
C. D. of our own otherwise I suspect we can't
possibly exist as a Nation. there would be
a failure of justice. It is practically im-
possible for the Stat Law to afford relief in
the most simple case, imaginable without
the aid of an unwritten Law. - So far there-
fore as the Law of England is applied or un-
just. here you ought to have a C. D. of your own

But it is said we can't have a Court
Law of our own because we are too young
as a Nation that we have existed as a
Nation from the conquest of Richard 1st
But this is a mere partial rule and of all
the rules of the C. D. the most arbitrary, and -
P

and inapplicable to this Country - Even in England before the time of Richard, 80 yrs only were required to make a good Custom. -

This is all artificial reasoning, or rather Sophistry, or Subtlety, it is not reached to at last. - Long and Gen Usage, without the lapse of a certain number of years is not sufficient to form a good Custom. -

B². The second branch of Municipal Law, is the "Lex Scripta," or Stat Law

The Stat Law consists of the act of the Legislature - Here the expressed will of the Legislature is the Law itself, and not merely the evidence of it. P

I would here observe that the ancient Eng Statutes are binding in this Country, in the same manner as the English Com Law. By "ancient Stat" I mean that which was enacted before our ancestors emigrated to this Country. - The true reason is given by the English Jurists - our ancestors took over so much of the English Law as they needed in their residence and business in this new Country.

There are two kinds of Statutes "viz" Public and Private, or Gen & Special.

A Public Stat is one which regards the

the whole Community. —

A Private Stat^e is one which regards ^{11 R. 85-86,} particular business, or individual persons only.

I cannot give a better definition! but this is not perfect. — In many Codes Stat^s relating to a class of persons are called Public Stat^s. — The rule is if the class of persons to whom the Stat^e relates is a Genus it is a Public Stat^e. But if it relates only to a Species it is a Private Stat^e. —

If the class of persons to which the Stat^e applies is divided into subordi- ^{15 Sess. 605}
nate classes, it is then a Public Stat^e. — ⁸⁰⁶
If the next division reduces the parts of the class into individuals, it is a Private Stat^e.

Thus suppose a Stat^e applicable to all Mechanics, this is a Public Stat^e for they constitute a Genus of which Sailors Shoemakers, Blacksmiths &c. are species. — ^{18 R. 86, 1st alt.}
^{4 Coke 76,}
^{20 Sess. 154}

But suppose a Stat^e made relating to all Sailors, or all Blacksmiths, this is a Private Stat^e. This distinction is important. ^{12 R. 86,}
^{20 R. 381}
^{D. 120.}

A Stat^e relating to all public officers is a Public Stat^e, but one relating to all Sheriffs is a Private one. — A Stat^e relating to all persons qualified to swear public Process is a Public one. — And a Stat^e relating to individuals, by name, however numerous,

those individuals are is of course a Private one

In England every Stat^e concerning the
 4. Coke 77 King is Public And so respecting the
 8 D^o 138 Stat^e of a State is a Public Stat^e, but
 Hobart 227 one relating to Roger Griswold by name is
 18 id. 409 a Private one

And it seems to be a Gen^l rule that
 10 Coke 54 a Stat^e concerning the Public Revenue is of
 4. Bac 640 course a Public Stat^e.
 12 id. 349
 3^o 673
 Plowden, 63.

A Stat^e may be partly Public and partly
 4. Bac, 640 Private, as is often the case.

2nd A second division of Stat^e is into
 those that are declaratory of the Com Law
 or remedial of defects ther^e in. This is a
 Coordinate division with the one above and
 not a Subordinate one. - a remedial Stat^e
 e.g. may be either Public or Private.

Most Stat^e are remedial, making some
 new rule of conduct or of right.

Again all Stat^e are either Penal
 or Remedial, or as B. Cock says Beneficial.

A Stat^e inflicting a Penalty or Punish
 1. Crof 9, 414-15 - ment of any kind (and originally synonymous)
 4. Bacon 480 is a Penal Stat^e.

To instruct all St^e giving higher com-
 1. Falk 212
 78 id. 123
 Com Digest does than justice against all Penal. But
 5. The Abbots they are not noted so in the English Books. -
 Stat^e A.

Stat^s not inflicting a Penalty or Punish-
ment of any kind are beneficial or remedial

189 Wilson 120
3 Coke 74
4 Bac 650
75 Rep 257

Stat^s giving Costs have always in Eng.
land been holden to be Penal. For by the
way Costs are entirely unknown at Law. Since they are now considered in the nature of
a Penalty. Costs were first allowed by the
Stat of Edward 1st in the Stat of Gloucester.

1 Bac 511
Salk 203
3 Inst 285
Guthrie 119
4 Moo 17

But tho. a Stat^s inflicting a Penalty of
any kind is a penal Stat^s yet an Action
brought upon it by an individual of his own
right to recover the Penalty is a Civil action.
The form of the Pleading determines whether
the Prosecution is Civil or Criminal.

Cooper 383
Do 391
Wilson 120
48 Rep 753
Do 257
Do 327

Finally all Stat^s are affirmative or
Negative but this is a distinction of very
little practical importance, may it not
be said as a rule of Construction?

13 Bore 89
3 Inst 200
Section 3rd

In England every Stat^s Commences
its operation on the 1st day of that Session
of Parliament in which the Stat^s is en-
acted: unless some other time is pointed
out which indeed is often done. The whole
Parliament is considered as but one day.
Now according to this, unless it is manifest
that acts of Parliament will in many
cases be retroactive.

20th 111
Do 222
Do 309
20th 371
18th 310

And on this gen^l ground that there is no
fractional part of a Session of Parliament it
has been held that if two Statutes made on
the same subject during the same Session
neither have priority. Hence if a Statute
to each other. Both will repeal each other
neither can take effect. The better opinion
is however notwithstanding this fiction of a Day
that the first in point of fact is to prevail.

* 4. Bac. 630,
6. Mod. 288,
20 - 288,
- 1 Jones 22
- 19 Vin. 220

This fiction has now been abolished in
Courts. Hence a Statute is not to have effect un-
til all the subjects have had the means of
being informed of it as a gen^l rule it is held
by the Sup^l Ct that it shall not operate
until the Representatives had had time to
return from the Assembly to notify their
Constituents.

Construction of Statutes.

by this word is meant the process used to
discover the will of the Legislature for that
will is the Law.

In the Construction of all Stat^s official
by, under a Statute, the points are to be considered
by the old Law. The mischief & the remedy pro-
vided by the new Law. And the rule is that
such a construction ought to be made
as will best supply the void and forward the
remedy.

18. Com. 87
3. Ch. 1

And in the case of Cases last mentioned.
Judgment can be given for the second offence,
unless it has been given in the first. & so he
will not be subject to the increased punish-
ment which judgment he had on the first
commissioned. The Jurists may have been had.

Penal Laws are in three situations
Hunting 38.
Hunting 790. strictly local. Hence the Prince & Duke of
1740. 1203. one State. can be at all regarded in any
350 Rep. 733. any other Foreign State. As to Law of
Effect

On the same principles an offence
committed in one County can be prosecuted
in another.

There has prevailed in Courts
1. Map. 115.
2. " 14.
Sec. vix. 2. Sch. 477.
" " 479.
a practice which I can't think to be Law.
If a House is stolen in New York and brought
into that State the offence may be prosecuted
there. You say they if a Thief steals in one
County and carries the Goods into ^{another} he may be
prosecuted there. The Cases are different, in
the latter Case the Thief is still breaking the
same Law in the former he is in another
Sovereignty.

The Penal Laws of every State are
local, and the State injured must redress
itself by its own Laws. Our Law has
known you really that the taking of Houses.
ind.

in the State of New York is an offence against the Laws of that State or that he is punished as is stealing in this State. I suppose the Punishment to be different in the different States. in New York a fine and in Conn^o hangings shall he who has done an act subjecting him only to a fine be hanged for coming into this State? Further if this person had been convicted he might be punished for the same offence in every State in the union: the Judges in one State are not bound to take notice of a conviction and punishment in another. a conviction in one State ^{can} not be any bar to a Prosecution in another. a bar operates on the ground that the same Law on which he is again arraigned has been once satisfied.

But tho' the special Laws of one State can't be noticed so as to affect the Subject of another State. Still they apply to all persons ^{within} their jurisdiction. whether Citizens, Aliens, Advers or Strangers for while in the State they are subject to its Laws and owe a temporary Allegiance.

It has been determined in Conn^o that when a person is repeatedly incriminated by the continuance of an offence that the offender shall be punishable for only one offence at a time. Thus if the person for

20 Coke 1289 ^{con-}termining a ^{con-}sumed Deer 10 Dollars a Week
 1 Root 325 then for a day and he can be prosecuted for only
 1 Root 37 one Dollar at a time. The Law is different
 in England and there is no reason for our treating

1 Coke 123 Permeica Stat^s are construed liberally
 11 Coke 71 and equitably. The latter may be enlarged and
 1 Root 325 restrained according to the spirit and reason of
 1 Root 37 the Law and for the purpose of affecting the
 1 Root 325 intention of the Legislature
 1 Root 37
 1 Root 325
 1 Root 37
 1 Root 325

1 Root 325 A Stat^e taking away a Corn Law
 4 Root 650 cannot be construed strictly, but as a
 1 Root 325 limited Stat^e because it does not take away the right
 of the Subject. So of the Stat^e of Limitations.

1 Root 325 The words of an explanatory Stat^e are
 1 Root 325 never to be extended by Construction.
 4 Root 650 Wherein there would be no end to Construction

3 Coke 82 When a Stat^e is partly general and partly
 1 Root 325 limited, (as frequently happens), it is to be construed
 1 Root 325 strictly as to the general part and
 1 Root 325 liberally as to the other

1 Root 325 And it is a very material rule in the
 1 Root 325 Construction of a Stat^e that such a Con-
 1 Root 325 struction be given as that the whole Stat^e
 1 Root 325 may if possible stand, and be operative
 1 Root 325 yet a saving, proviso or exception not totally
 1 Root 325 repugnant to the Substance of the Statute
 is void -

Where two Stat^s are repugnant to each other the latter prevails. Lecture 4.
 where the latter prevails the former is
 void so far as the repugnancy goes. It is a kind
 of principle that the last declared will of the
 Legislature is Law —

Mod^o 287
 1 Inst^o 111
 2^o 113
 4 B. & C. 638
 1 B. & C. 89.

If there is any inconsistency between the two Stat^s, the former is so far abrogated. Because the latter is the later.

On the same principle if there is a repugnancy between two different parts of the same Stat^s, the latter part prevails the former. Because it is the last express will of the Legislature.

Every Stat^s is in its nature repealable. If the Legislature don't repeal a Law then are not the sovereign power. For the act of repealing is as much an exercise of sovereignty as the act of making Laws. — On that principle a clause in a Stat^s providing that it shall never be repealed is void, for this would be abridging the power of the subsequent Legislature, who has the same right to make Laws as the former.

Indeed it is a general rule that all Legislative acts, in derogation of the power of a subsequent Legislature are void.

With regard to the repealing of Stat^s by a subsequent

probat⁹ 88 the Law never favours the repeal of a Stat^t
 11 Coke, 63. by implication. there must be a clear
 10 Mod. 118. and palpable usurpation

As said to be a rule of Construction.
 You intended that an Affirmative Stat^t don't repeal
 18 Brn 89 the C Law - but in reality it makes no
 + 10 Mod 357
 + 44 Brn 200 difference whether the Stat^t is couched in af-
 Com Dig 566 firmative or negative terms, which is the
 action on B.C. only difference between these two kinds of Stat^t
 Co Dig 411-13. Disput the C.L. has been as often repealed by
 2 Brn 300 affirmative as negative Stat^t. Therefore
 23 Brn 843-8 is altogether arbitrary and unsafe -

Any Stat^t which repeals the C.L. is incon-
 sistent, repeals the C.L. -

There are many Cases in which Stat^ts
 Sub page 307[#] affirmative or negative don't abrogate the
 C.L. in relation to the same Subject. but
 both stand, and there are then two concurrent
 remedies. In such Cases the Stat^t remedy is
 called "accumulative" and the party may
 seek either the Stat^t or C.L. remedy. If
 When the Stat^t does not repeal the C.L.
 it only gives another remedy, as in action
 of Battery or Slander in C.L.

44 Brn 554 But if a penal Stat^t inflicts a
 Seach & Cove lower punishment than is prescribed by the
 C.L. the C.L. is repealed, on that Subject. -

Yet if the Stat^e inflicts a higher punishment than the C^d the C^d it seems is not repealed. But the remedy is Concurrent. —

Radd. 206

10 Dec^r 337

4 Burr 1020.

But if a Stat^e inflicts either a higher or lower punishment, than is prescribed by a prior Stat^e, the prior Stat^e is repealed.

The reason for this diversity I suppose to be, that as two Stat^s made "in pari materia", are considered as one Stat^e. And is otherwise said in congruity in supposing the same Law given should in the same Stat^e inflict two different punishments for one and the same offence. —

Search 202

4 Burr 2020

4 Bac. 654

here the first is repealed. page 30

With regard to Affirmative and Negative Stat^s it is said, again, that an Affirmative Stat^e does not repeal an Affirmative Stat^e — Now there is no sound sense in the rule, and is untenable. — It will if inconsistent with it otherwise it will not. —

2 Show 30.

10 Corn. 89

Finally the intention of Legislature is ultimately the Criterion in all Cases.

45 The P. 3

4 Bac. 647

Radd. 202

11 Coke 73

The above rules are not intended to apply where there is an express clause of repeal.

If a Stat^e repealing a former one is itself repealed the former Stat^e is revived. The former is repealed only by virtue of the repealing Stat^e when that is taken away of course the former one is revived. —

45 The P. 3

4 Bac. 647

Radd. 202

11 Coke 73

4 Inst. 423 But if one Stat^e is repealed by two
 4 Bac. 638 others, and one only of these repealing acts
 is repealed the other repealing Stat^e will
 continue the repeal of the first.

2 Inst. 681 And in the other kind of a Stat^e
 4 Bac. 638 which has been once repealed is revived,
 the repealing Stat^e is itself repealed -

It is said in ^{perkins} Bacon, a rule to which
 is one part I cannot give my assent that
 when a Stat^e is repealed and void
 acts done under it while it exists are ille-
 gal. Indeed I think it is now too late to
 4 Inst. 233 contend that our Legislature can repeal Stat^e
 4 Bac. 638 the acts of a former Legislature are void -
 they may repeal or abrogate, but not
 make void. "perkins" also says the Stat^e
 3 East 215 Stat^e is repealed, yet acts done under it are
 still binding. To this I cannot assent.

Stat^e Cant. have a retroactive operation
 The Legislature are not the persons to decide
 Root 59 on the Constitutionality of Laws. This is the pro-
 vince of the Judge

When a Stat^e after being vid-
 uated, but before conviction and punishment
 of the offender is repealed, then the offender
 Cant. be punished. (unless by a person in the
 power) He cannot under the old Law. For

For that is not now Law, and therefore *Judge* 180. Rep. 401
 can't be rendered on it. He cannot render 180. Rep. 169
 the new Law because it would be an "ex
 post facto" Law, which by the Constitution
 is unlawful.

Indeed if the repealing Stat.
 contains a Clause, declaring the old Stat. "re-
 pealed" as to all acts committed under it, as
 is now common, then he can be punished un-
 der the former Stat. The same doctrine
 was recognized in the Circuit Ct. of the U.S. in
 W. L. 48. Headwell.

But when it is said a State cannot
 have a retroactive operation it is with a
 distinction.

If one Covenant do an act
 lawful at the time but which a subse-
 quent Stat. makes unlawful the Covenant
 is annulled.

Calh. 198
 50 Ky. 317
 23 1/2 1352
 Stat. 444
 do 1146.
 80 Ky. 207
 100 Ky. 211

So on the other hand if one Cov-
 enant not to do what it is afterwards made
 his duty to do, the Covenant is annulled.

Vol. 3rd 100
 Calh. 198

Thus of an apprenticed. Covenants, to continue
 with his master so long, but a public
 Law makes his military services neces-
 sary, the Covenant is void.

But these rules are not in violation
 of the Constitution of the U.S.

Q. u. r.

4ac 2nd 493

Our Constitution does provide that no Law shall be made to impair the obligation of a Contract. Yet the meaning of the Law is that no Law shall be made for this express purpose to have this effect.

But if the Legislature without any view to Contract prohibits (as they may) certain classes of acts which in their ordinary consequence impair any Contracts such acts are nevertheless good and by no means unconstitutional.

I take the rule & distinction to be this "a Law made for purpose to destroy or impair Contracts is unconstitutional."

But a Law made on a proper subject of legislation but in its remote or indirect consequences impairing or destroying Contracts is still not on that account void.

Stalk 198 If one Covenant not to do an unlawful act and a subsequent Statute makes that act lawful that Statute annuls the Covenant but it is still binding.

11p. 36. 05 If a Contract is made while the Statute is in force, but a subsequent repeal of the Statute makes the Contract good. The Contract was "ab initio" void and therefore can't be set up.

A complete performance of an agreement
is made illegal by Stat. still if it can be
partly executed it may be. it will be enfor-
ced in Equity and I believe at Law.

And the Price is the same wherever they come
"plate" performed is undeniably impossible by
the act of God or inviolable accident. 7

The Ch. of W. L. prohibits all "ex post facto" Laws, and all Laws impairing the Obligations of Contracts - art. 1 Sec. 10.

Arthur Scott,

The "ex post facto" Law is a
retrospective Law. An ultra vires Law
to impair the obligations of a Contract, is one
designed for that purpose.

A fact requiring what is physically impossible is of course void. "Est non dicitur ad impossibilia" - is an important maxim in the English Court Law.

R. Brown, 91.

It is laid down by Ed. Hobart, that
Laws contrary to reason are void. So says
Judge Blackstone in one place that Laws, ^{Blacks} contrary to reason, or the Law of God are void. ^{Blacks} 91
which Lord He very justly denies in another
place, as it is a dangerous Rule, and if acted
upon would destroy the administration of any
regular Government. The Judge himself is to be
the judge of the reasonableness of the Law. or,

1. Blooms 69.
D^o - 91

on this Principle, which would be of very dangerous consequence. And I think the other Book 879 That of the Law & the Law of God are odd, - is equally indefensible. And 1806 263 41 differ in opinion as to what the Law of God is. 91. The municipal Laws of the Land must govern and judges have no power to, a brogat or annul them because unreasonable or erroneous.

Whether State oppose to a written Constitution, are valid or not is totally a different question; And can be ascertained by that Laws oppose to the Constitution are totally void. The Constitution is a part of the Civil Law and of paramount authority to any other Law or Statute. It is made to restrict the Legislature and power. Hence if the Legislature have a right to alter or infringe upon it, rules and principles a Constitution is a perfect nullity.

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The Constitution and the acts made under it are the written Law of the Country, the former is paramount in authority, Hence if repugnant the Constitution is to govern. The judges must determine the Constitutionality of Laws, and so it has been determined, and settled in every State in the Union.

It is for a man that when a State enables a State to do a matter of justice between persons

persons. the CP is bound to do it, and the Par
ty may claim it as a matter of right. In
this and in some similar cases, "may" is
equivalent to "must" or "shall".

2 Hawk 203
D. 374-5
20 Cr. 1131.
5 Cr. 538
4 Bae. 644

If a Stat^d makes a new Law, concerning
an old offence and appoints particular judges
to execute it, it does not constitute a new ju-
risdiction. yet the CP of ordinary jurisdiction
are not ousted of its jurisdiction, because it is
a rule, that CP are not to be ousted of their
jurisdiction by implication.

1 Mood 452
1 Hawk 8, 9
D. 114
9 Coke 118
Falk. 504
2 Bae. 1047
Coke 524
1 Bae. 90

On the other hand if a Stat^d creates a new
offence, and establishes a new jurisdiction for
the trial of it, it takes the better opinion to
be that the CP of ancient criminal jurisdic-
tion are ousted, because they never had ju-
risdiction, -

1 Hawk 9.
10 Cr. 190
2 Hawk 302
Coke 643
Coke 524
2 Hawk 5

Whenever a Stat^d confers an au-
thority upon certain individuals which author-
ity may affect the rights of others, the au-
thority must be strictly pursued, & those
acting under the authority must take every care
that is prescribed by the Stat^d, - and such who
appear to have seen the actual case, from
the face of their own written proceedings, the
verdict they are presumptive.

If a Stat^d empowers a body of men to seek
(by)

4 Dec 642 by majority of votes. It is a question whether a
 3. 1102. 13 majority of the members of a majority of the
 3. 1102. 13 majority of the members of a majority of the
 4. 1102. 13 majority of the members of a majority of the
 10. 1102. 13 majority of the members of a majority of the
 10. 1102. 13 majority of the members of a majority of the

If an authority of a private nature is con-
 fided in two or more individuals, the authority
 is joint and not several. Therefore on the death
 of one the authority does not survive to the
 others, unless there is an express clause giving
 that right of survivorship.
 But if the authority is of a public
 nature, it is as if appointed several, as well as
 joint and will survive, because they are
 officers, and not mere servants or agents as in
 the first case.

2. 1102. 13
 1. 1102. 13

In the case of a Corporation, the act of
 the majority of those present at a meet-
 ing, after having had requisite notice to attend,
 will be the act of all and is binding on the
 whole. Because a Corporation is a mere
 legal entity, and the members individually
 who compose it are not known as such.

In the construction of Stat. the word
 "void" is often construed only as "voidable".
 If where a Contract is declared void, the op-
 eration of the Stat. would be defeated, unless the
 word "void" was construed in its strict sense.

it to be so construed. If it would not be
 defeated in, if the mischief intended to be
 prevented by the Stat^s may be prevented.
 without Construing it absolutely void, it is
 then to be construed "voidable". Only.

The rules of Construing Stat^s are the same both in
 in Civ. & Equity as of Law. The mode of relief
 is the same in different. but the circumstances of. D. in 4387
 Construed are equally binding on both Ju-
 risdictions.

Section

Of Pleading Stat^s and the mode of
 presenting them.

Pleading, Counting
 upon, and Quoting Stat^s are different things.

Pleading Stat^s is nothing more nor less
 than stating those facts which bring the D. D. 221.
 Case or action within them. This will pre-
 sent no need or action of affirming the Def. of
 Acts that he has not grounded within Cases.
 without any express reference to the Stat^s of
 Limitations.

Counting upon a Stat^s consists
 of an express reference to it, as by the words
 "Conceded for many Statutes" in such Case
 made and provided on "by virtue of the Stat^s

Quoting a Stat^s is merely quoting the
 contents of it. In Gen. it is wholly unnecessary, in

When it is necessary to plead Statutes, -

And here is a Gen. rule that judges "ex officio" take notice of Public Statutes. But of private Statutes on the other hand the judges do not and cannot take notice, unless the Statute is specially pleaded, or set out.
 10 Coke 57. Public Statutes are the Laws of the Land. but private ones are the mere evidence or muniments of private rights, and the judges are no more bound to know these than they are to know the Contents of a private Deed.

But under the Statute of Reading in Conn. a Statute may be given in evidence by way of defence under the Gen. Issue, without pleading it. This is a local usage. But it must be read here as well as in England, and as in England the Statute which is the foundation of the action, must be declared upon, and set out because it is not part of the Gen. Law of the Land.

4 Bac. 653. Appraised Statutes when pleaded must be recited literally or substantially, and 10 Coke 57. Public Statutes need not be recited.

10 Bac. 655. The misrecital of a Public Statute is dangerous, in some cases fatal, even after verdict. Cooper 474.

It is laid down in a case in Croker's cases, the misrecital of a Public Statute is

is not fatal, if the misrecited is of an immaterial part. - I take this not to be the true rule. The true rule I take to be, this, that whether in a material or immaterial part, if the Pleader misrecites himself up to the form of the Statute as recited by words of reference to it, as "as aforesaid", it is fatal. - But if the party does not go down words of reference to the Statute as recited kind, himself down, and the party misrecited is immaterial, the party is not bound by it.

Ex Chas 376, 120 Reg 382, 4 Reg 559, 19 Reg 588, 80 Reg 134, 20 Reg 582, 21 Reg 584, 22 Reg 584, 23 Reg 584, 24 Reg 584, 25 Reg 584, 26 Reg 584, 27 Reg 584, 28 Reg 584, 29 Reg 584, 30 Reg 584, 31 Reg 584, 32 Reg 584, 33 Reg 584, 34 Reg 584, 35 Reg 584, 36 Reg 584, 37 Reg 584, 38 Reg 584, 39 Reg 584, 40 Reg 584, 41 Reg 584, 42 Reg 584, 43 Reg 584, 44 Reg 584, 45 Reg 584, 46 Reg 584, 47 Reg 584, 48 Reg 584, 49 Reg 584, 50 Reg 584, 51 Reg 584, 52 Reg 584, 53 Reg 584, 54 Reg 584, 55 Reg 584, 56 Reg 584, 57 Reg 584, 58 Reg 584, 59 Reg 584, 60 Reg 584, 61 Reg 584, 62 Reg 584, 63 Reg 584, 64 Reg 584, 65 Reg 584, 66 Reg 584, 67 Reg 584, 68 Reg 584, 69 Reg 584, 70 Reg 584, 71 Reg 584, 72 Reg 584, 73 Reg 584, 74 Reg 584, 75 Reg 584, 76 Reg 584, 77 Reg 584, 78 Reg 584, 79 Reg 584, 80 Reg 584, 81 Reg 584, 82 Reg 584, 83 Reg 584, 84 Reg 584, 85 Reg 584, 86 Reg 584, 87 Reg 584, 88 Reg 584, 89 Reg 584, 90 Reg 584, 91 Reg 584, 92 Reg 584, 93 Reg 584, 94 Reg 584, 95 Reg 584, 96 Reg 584, 97 Reg 584, 98 Reg 584, 99 Reg 584, 100 Reg 584.

But the misrecital of a private Statute never be fatal after verdict, because it is a mere matter of private evidence, and may be objected to, or taken advantage of, and the fact of its misrecital don't appear on the record, and the judges can't know it "ex officio" or judicially. - It is just like the misrecital of a deed or bond, which the Court regard not till pleaded.

Neither is a plea demurrable because the Statute is misrecited, yet the party against whom the Statute is pleaded, may take advantage of it by pleading *oyer*, or *reciting it truly*, and then demurring.

So if a formal Statute is misrecited, the opposite party may take advantage of it by pleading *"And true record"* -

subseq. To the variance may be pleaded specially.

In England by C.B. even a Public Stat^t
tre 4th 148 when it is used for the purpose of defeating
5 Bac 419 any Book, or Deed. must be specially pleaded
5 Coke 59th as in Case of Wemyss &c. Quare the Books
7th 119. the Law seems so highly of Deeds & Specialties.
8 Hob 172 that it will not suffer them to be defeated.
8 Salk 391. unless the Stat^t is specially pleaded. This
1 Selwyn 503 says Mr Gould is not the true reason.
2nd 572-3.
582-5

The latter rule is varied as Stat^t in Court
have this Diff^y may in this Case proceed w.
"Non est factum" and give the Statute in
evidence under the Gen. Issue.

4 Coke 70 In declaring on a Private Stat^t the Diff^y.
2 Black 405. must not be Stat^t specially.
2 Will 157

When a Stat^t is both Public and Part^l
10 Coke 57 Private, the same rules apply as tho. the
8 Hob 207. Public & Private provisions were in two
separate Stat^ts.

It were necessary to refer to the Title.
3 Coke 38. or rather the Presumptions of any Stat^t Quare
4 Bac 405. neither of them are any part of the Law but
2nd 658 only the name the Legislature has been pleased
to give it.

And it has been held that the mis-
22 Ry 77. taking of the Title of a Public Stat^t on demur-
ver.

remuner. is not fatal. but it has been. 6 Mod. 52.
 since determined otherwise by Ed Holt. —

To maintain on a Private Stat. "Nuc - 8 Coke 287 -
 tied record" may be pleaded. but when a Pub. 2 Mod. 57
 Stat. is misinterpreted, the Ct are to determine. Co. Off. 350
 whether there is such a Stat. and "Nuc tied 4 Bac. 655
 record" can be pleaded.

In pleading Public Stat. its unre- 3 Bac. 387
 cency in Gen. is unite. or set them out. or Co. Off. 501
 count upon them. its sufficient to plead. Conting 382
 the facts which bring the Case within the
 Stat. — To this Gen. there are 2 or 3 exceptions.

1st If in a given Case there is a two fold.
 remedy, viz at C. L. and by Stat. the party de 1 Com. D. 230,
 pleading on the Stat. should plead. 4 Bac. 187
 the Ct could not know whether the action
 is brought at C. L. or on the Stat. But I ap
 prehend days are gone, if no other remedy is
 expressly sought the Ct will presume it be,
 at C. L. and.

2nd In actions brought on a Penal Stat. 2 Hawk. 350
 the Stat. must be counted upon. whether it 2 East. 523
 be a Public or Private one. I know of no 75 Rep. 521
 reason for this rule says Mr Gould. — 1 Keble. 103
 1 Haring. 32.
 1 Bac. 387

3rd Where a Public Stat. gives a new. 4 Bac. 656
 action (i. e. a species of action unknown at 198 Vin. 504
 C. L.

2 East 331 D. Q. D. it is necessary to count upon it, if its remedy is pursued, its not necessary to write D. the Court said. - The right in this case may have existed at C.D. the action only being new.

4 Bac. 655 D. on the other hand when the Stat. extends
2 D. 439 an old remedy to a new case the party need
1 Com. Dig. not count upon it -
20 Ed. 230.

And in actions founded on Stat. not founded, it is not necessary to count upon them. So if a Stat. creates a right or imposes a duty, and gives only damages and not a penalty for the violation of the right or duty, and neglect of the duty, there is no need of counting upon the Stat.

Where a Stat. merely creates a right and gives no remedy at all there is no need in pleading the Stat. to count upon it.

Rowen 206. And if one penal Stat. creates a right, it is an act, and another afterwards inflicts a penalty both must be counted on.

Where the remedy is cumulative, the issue may be laid in one indictment. Thus, 22-23. 2 East 333. not in the County as being in violation of both the Com. and Stat. Edw. The County must be distinct, and if one fails that does not destroy the other.

If a temporary Penal Stat^e is continued or revised by a subsequent one the first one need be pleaded or. The effect of the second is null by itself at the first which is the one that pro- hibits the offence.

20 Reg 1000,
20 Geo 1838
D - 1850

When that which is an offence at Law only, is charged as having been committed, "Contra Formam Statuti" - These words may be rejected as superfluous, otherwise the indictment could not stand.

35 Reg 102
8 D - 3023
25 Statute 185
D - 110

If a Contract or Conveyance which at Law is good, without writing, is required by Statute to be written, it is still not necessary to aver in the Statute to allege that it is in writing, if in fact it appears in evidence to have been written.

3 B. Mon 1890,
12 Geo 3440,
3 B. Mon 379,
3 B. Mon 1251,
Cowley 289,
12 Geo 77-8,
2 D - 140,
Statute in Stat.
8 Geo 1802-4
3 B. Mon 376,
6 Geo 38, 43
8 Geo 205,
D - 307

But whenever a party relies on a Contract at Law not good if unwritten, he must allege it is written in pleading.

The reason of this distinction is stated to be J.G., that in the former case it was not necessary to be written at Law by which the forms of Pleading have been established - The Statute has introduced merely a new rule of Evidence, no new rule of Pleading - But in the other case, it still remains as at Common Law. When a Test maker writing necessary, rather than a witness.

see 4 Geo 2
4457
430

validity, of a Contract unknown at C. D. and
 here it must be proved, as being written, for
 as the ^{Case} requires a Contract to be proved
 as written, then it required to be written
 & then the Test creates a Contract unknown
 to the C. D. and again it to be in writing it
 must be so declared -

If that which was no offence at Common Law is made one by Statute, and the mode of prosecution pointed out in the Statute, that mode thus pointed out is the only mode, all others being excluded. There is no C.E. applicable to such a Case.

Co. L. 044.
Falk. 450.
7 Co. 30.
2 Bul. 803.
Do. 834.
4 Do. 2323.

This is not to be taken with qualifications, it holds only in two classes of Cases. "viz"

1st Where the mode of prosecution is prescribed by the Statute or enabling Clause of the Statute.

2^d When there is no prohibitory Clause but the Statute says "whoever does this and then shall be punished do and so." In the first place the mode of prosecution is incorporated with the description of the offence.

1 Bul. 544.
48 Rep. 200.
2 Hawk. 302.

But on the other hand if the mode of prosecution is pointed out in a particular substantiated Clause then the Com Law mode, adapted to the Case may be pursued.

48 Rep. 200.
2 Hawk. 302.

And if any thing which was before punishable at Common Law is prohibited by Statute, and some particular mode of prosecution is pointed out by the Statute even in the enabling Clause still the C.E. modes may be pursued. — The Statute is Cumulative.

2 Bul. 803.
Do. 803.
Do. 834.

If a Statute merely creates a right or power, it does not create an offence and gives no express remedy. 3 Dimes 290.

425 or sanction, at all the C.D. will not issue,
 653. As in fact the Stat. as I suppose a Stat. says.
 10 Coke 75 "Hereafter no person shall export wool from
 500. 28. The 28. 11. without saying more. He who mistakes,
 the Stat. is punishable for a misdemeanor.

To also to obstruct the execution of Stat.
 425, not granted by Stat. is an offence punishable
 at Com Law.

Who may prosecute on a penal Stat.

It is a general rule of Com Law that a public
 offence cannot be prosecuted by any individual
 2 Hawk 203, and in his own private right. In Capital,
 18 C. 2nd, if the prosecution must be according to all the
 analogies of the Law, in the name and on the
 part of the party injured. But if the public
 wrong works also a civil injury to him, he
 may for that prosecute. But not for the public
 offence as such. - The party aggrieved must
 sue the remedy. And the Public.

Search 1928
 D 229, 231. In England indeed private persons do
 D 233, 240 prosecute Felonies, but not they do it in the
 D 257, 260 name of the King —

3 Bar. 508

We don't allow any private individual
 is allowed to conduct a prosecution in the
 name of the State.

There is however a species of mixed
 prosecution both public and private.

Called a "qui tam," but in behalf both of
the individual prosecuting and of the Public,
The words its name ~~from~~ the words "qui-
tam," which show that there are two grounds
of prosecution. The individual is the Complainant

48 Conn 318
3 D. 102
1 Bac. 37

These "qui tam" prosecutions may be either
by action or information. A "qui tam" action
is conducted by Civil process, a "qui-
tam" information, by Criminal process. -

38 Conn 101
4 D. 308

If then you find a "qui tam" prosecution
you ascertain whether it is an action or in-
formation, and determining the form in which
it is commenced. - The action brought
by an individual in his own right, is a Civil
action, even tho' on a penal Stat.^o

Casper 382
48 Conn 750
2 D. 758
1 Wilson 125
3rd 7th 448
D. 257
Hibbs 179

This distinction between a Civil and penal
action is very important in practice. In
England a Writ may affirm in a Civil,
but not in a Criminal action. So in a Civil
action the party may appear by Attorney, but
in the information he must appear personally.

"Qui tam" actions are Genl. Writs on penal Statute 8.
Shall, to move some penalty, or forfeiture, -
In as, they are considered at present as the
creatures of Penal Stat.^o for the, there, were
once a few at C.S., yet I apprehend no one
lies at C.S. in its present state.

48 Conn 318
1 Bac. 37
2 Hawk 87
Crisp 87
Co J. 356
D. 332, 3.

A Popular action is one given to any one who will sue for a penalty incurred by the violation of some penal Stat., so called because the right of action is given to any one who will prosecute. Sometimes the whole penalty, and sometimes only a part of it is given to the prosecutor.

A Popular action and a "Qui tam" action are not specifically the same. True a Popular action is almost always a "Qui tam," yet it may not be; and a "Qui tam" may not be a Popular action.

1st Because the whole penalty may be given to the prosecutor. Here it cannot be necessary to join the King or the Public, as they have no part of the fruits of the prosecution.

And a "Qui tam" may not be a Popular action, for the right of suing may sometimes be confined to the party injured by the offence.

We have as well as the English a Statute of this kind, yet as the penalty is to be divided between the party injured and the public it is a "Qui tam." A B. in a "Qui tam" a part only of the penalty goes to the Subject, and a part to the King, is a Popular action the whole penalty goes to the subject prosecuting. Bacon, says it may be a "Qui tam" action tho' the prosecutor has the whole penalty.

If an Individual is civilly injured by an
 offence prohibited by Stat. he may have his private
 remedy, tho' the Stat. furnishes none specifically.

As if the Stat. should prohibit a breach of
 trust, and give a penalty, this Law impliedly gives
 the Party injured a remedy.

And it is a Gen^l rule that whenever a Stat.
 prohibits or commands anything for the ad-
 vantage of any individual generally, he may
 have an action by the Stat. for any injury or
 occasion to him by its violation. This is nearly
 the same as the former rule.

When a Stat. inflicts a penalty upon
 any one for withholding any act of his right
 or interest, and makes no appropriation of the
 penalty, the who is injured and not the State
 shall have the Penalty.

From what has been said, we are prepared
 to enquire in what cases a "qui tam" pro-
 secution will lie? for which I now enquire.

If for an offence immediately injurious
 to the Public, viz. a Stat. gives a penalty and
 pays to him who prosecutes any person may
 bring a "qui tam", action to recover what
 penalty.

If a Stat. for any offence inflicts a
 fine or penalty, and gives also a sum certain

4 Coke 13, to the Plaintiff an action of "Trespass" must
 Consideration be had to recover the penalty for the public
 on Stat 81, and damages for himself.

These rules relate to Stat^s inflicting penal-
 ties for injuries immediately injurious to the
 public only - but no individual can in such
 case sue for the penalty unless the whole or
 a part of it or a sum certain is given to
 the individual prosecuting.

The reason of the distinction is manifest,
 in the one case the individual has an interest
 in the other he has no interest or right.

On the other hand if a Stat^s prohibits an
 offence immediately injurious to an individ-
 ual as well as to the public he is entitled to a
 "Trespass" action, not only where the Stat^s gives
 him the whole or part of the penalty or a sum
 certain, or damages but tho' the Stat^s gives
 him nothing at all. He may have a "Trespass"
 prosecution. Thus when a Stat^s prohibits
 a private offence as a public offence only,
 giving a penalty only to the public the party
 injured may bring a "Trespass" -

But if the whole penalty is allotted to the
 party injured no doubt but he may maintain
 an action.

Where a penalty is given to the
 party injured and a civil remedy to the party injured,

the fund to the public may be inflicted, of course 2 Bac. 500.
on the conviction, of the Offence in the Civil. Salk. 636,
Sunt. The Individual may sue in his own sole, Cuthb. 390 +
right in such case. This is a familiar proceed-
ing at Com. Law. But I have ^{never} known it done in
our practice.

As to the mode of prosecuting, 4 Bac. 653.
If no form of action is prescribed the action of ^{Proffam} 175.
Debt is the most proper and Common action. ^{Est Dig. 17}
And action on the Stat^{ut} as it is called, will lie. ^{2 Leon. 200}
I doubt whether. And Statut^{ut} Offensum will lie, ^{Cuthb. 90}

And tho' a specially inflicted is allotted part 3 B. Com. 102
to the King and partly to the prosecution. ^{2 Leon. 392}
Yet the King may sue for and recover the whole ^{11 Coke 63-6}
penalty. ^{7 Salk. 550} It is the same in this Country. "mutatis
mutandis."

A "bona fide" conviction or acquit-
tal on a "hinc tunc" prosecution by action or ^{2 B. Com. 302}
Information, is a bar to any other prosecution for ^{1 Bac. 41}
the same offence. But the conviction must ^{11 Coke 650}
be "bona fide." A sham prosecution is not ^{Co. 2. 486}
allowed to bar the offender from public jus-
tice. ^{13 Salk. 667}

And the necessity of a "hinc tunc" prosecu-
tion may be proved in abatement of a sub-
sequent Public prosecution for the same offence. ^{1 Bac. 41}
This rule undoubtedly operates both ways. Some ^{Co. 2. 209}
say it may be proved in bar but this is incorrect ^{2 Leon. 391}
^{3 B. Com. 1423}

A Person claiming a penalty under a Penal Stat. has no right attached in himself until the commencement of the prosecution. It is a remedial Stat. the rule is otherwise. Where the party has a right of action from the moment of the injury done. By Com-
 2 B. & C. 1109, minding the prosecution on a Penal Stat.
 3 B. & C. 1423, he acquires an immediate right which is consummated by judgment.

Hence when a Penal action is given by Stat. it is a Penal Stat. the thing may be a private action by releasing the penalty or by a Pardon before the action is brought. But after the action is commenced the thing can release only his part of the penalty.

After the penal action commenced then the thing cannot in any way release the offender and the penalty. But it is said. "The Legislature can do this but says Mr. Coles. It has no more right to release the penalty than to deprive a man of his property. It may repeal the Law."

But when a penalty or part of the penalty is given to the party injured by the offence. It seems the thing cannot even before the action brought release either party of the penalty. Hence the party has a right commencing with the offence; it is a remedy.

It seems that at C. Law the presentation
on a popular action might formerly release
his pack of the penalty after conviction and
after that no individual could prosecute again
but he could not occur before conviction as he
had then no consummated right, and a re-
lease of an inchoate right did not bar an
other action, tho he might occur all the right
he had. - The consequence of the above rule
was that offenders would often escape the pun-
ishment of the Law as the friend of the offended
could commence the prosecution and release.

Since it was enacted by Stat. 4th of Edw. 102
Henry 7th that no convincing recovery in a
popular action should be a bar to a subse-
quent action as to bona fide for the 1st Selwyn 007
same offence - The same Stat. also enacted
that no release given by the D^{ff} pending the
action should avoid the D^{ff}.

Now I should think this Stat. was no more than 395
than an affirmation of the C. Law of Gauc. 3 Coke 177
The C. Law provides against fraud, - King's Bench
Hill, 4th 1801

But at any rate this Stat. has now
settled the Law and it is operative in this
country as it was passed before settlements here 1802 43.
The farther at the end was not yet 28 Bank 397
reconsidered. Effectually it was enacted by Stat. 18th of
18th of Elizabeth that the D^{ff} in a popular action, 987
action.

Eliz. 167 action, cannot on pain of the Statute make any confession till the Judge makes answer in C.P. or afterwards. with^d leave of the Court.

And even at C.D. before the Statute a bond
11 Coke 65^a, 66^a, for^d release would not bar the King's right
1 Hawk 391. to prosecute tho. it would that of any other
individual. Yet for this purpose it must
have been given after conviction for before con-
viction this right was only indicated.

If the Off. is a Popular action, dies with
2 Hawk 392. ^{releases} releases, or suffers a verdict the pub-
11 Coke 65^a, 66^a, lic prosecution may proceed in that action
5 Coke 48. or commence a new one. — But when the
3 B. Com. 102. action is given to the party injured by the
offence, if he dies, or the public prosecutor
dies, the party's right is so far civil

If several joint offenders are convicted
on one popular action only one penalty
is inflicted on the whole. But if such offender
are all convicted on a public prosecution
the entire penalty is inflicted on each.

Burdett 189.
Moore 453.
Hoy. 60.
Co. Eliz. 480.
Salt. 182.
2 B. Rep. 809.
Case per 610.
There is a material difference between an
action for Debt on a public Statute and a
public prosecution, by a public officer.
It is said that in one case it is in nature
of a satisfaction, and in the other of punishment.
B. & C. take the reason to be founded altogether
in.

in the form of the action. One is that of Debt.
 But when a Criminal Process is used there is Supra
 no fiction. in the Case each individual is
 liable for the whole offence. Crimes are several
but Debts are joint

It was formerly observed that there was a
 great difference between the act prohibited
 by Law and the offence growing out of that act,

One act may constitute different offences, Cowper 649,
 and a punishment for the lower offence is no
 bar to the prosecution for the higher.

In Populæar Actions in England the
 prosecutor is entitled to no Costs unless ex-
 pressly given by Stat. -

Deeble 781
 Falk. 206
 176 Blk. 10

But the party injured by Prosecuting be-
 comes entitled to Costs as in other Actions -

But in Common the Prosecutor always
 recovers Costs, when he gets his Cause.

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Private Relations

Baron. and Seme

Baron and Yeme

Hon^{ble} W^m Rives

May 1812.

The rights which the Husband acquires
by Marriage over the Personal Property of
The Wife. Power of Property is retained

Personal Property is of three kinds. 1 Property in Possession as money, Cattle &c. 2 Choses in Action, as right to damages &c. 3 Estate in Land which the Wife has for years.

The Husband by marriage acquires an absolute right over the ^{personal} property of the Wife in Germany, and her rights are entirely destroyed. This Law may operate

entirely destroyed. This said may operate
injunctively to the Creditors of the Wife. For, al. ¹⁸⁸⁹ 416
tho. the Husband is liable for her debts ^{2d} 409
ring the Coverture. He is not after that is ^{3d} 412
at an end. Supposed Annular Bond ^{Valley Court} 173.

at an end. Suppose Ann married B with
10,000 £ fortune. and she dies before her husband
don't collect their debts. they can then obtain
nothing. But if the husband die she is
still a widow altho. he may have spent all
the property he received from her. - The

The Husband's liability does not arise from his having received her Property, but because the Law supposes him to take her with all her incumbrances.

But on ^{the whole} the Creditors of the Wife are far from being injured by the Law of Bacon & Gent. for if the Husband receive no Property by the Wife, he is liable during Coverture for all her Debts, and shall be seized of Property, he is not liable to the extent of that Property only, but for the whole amount due. Whether is not liable on the ground of having received Property, neither in the Conscience, the Debtor, but she is. What then is the ground of her being sued, and he also? — She is sued in order that if he did before judgment be rendered, the Suit may survive against her, for she is the real Debtor. The ground on which the Husband is sued is a matter of Policy, in providing for the Wife, as she has nothing of her own during Coverture.

It would be necessary to send her alone for she can be imprisoned without her husband, nor can he discharge himself without discharging her, in any civil case whatever. So — this is if he be the person, and as she must be discharged. There is but one case to the contrary, and that is where a suit is commenced.

71

commenced against her before marriage in such
case, the said wife proceed against her as a separate
sold, and in her maiden name. The liability on the part of the Husband was for the
benefit of the Wife, and not a security to the
Creditor.

2^d, The Husband's right to Choses in action
(which are Notes Bonds, Contracts, Damages,
for injuries &c.) is not so extensive as that to
Personal Property in possession but when
these Choses in action are reduced to posses-
sion the right is the same in both.

He then has a right during Coverture to
reduce these Choses in action to possession
but if he does not before his or her death,
then in the first case they will survive to
the Wife, and in the second they will go to
her next of kin or legal representatives ac-
cording to the principles of the Common Law.

But can the Husband assign these Choses in action? yes as his own property, excepting that he may give his own away; but this he can assign, only for a reasonable and valuable consideration. If this be a "bona fide" assignment and not a mere colour to exclude the Wife's right she will be bound by the assignment. — Judge Reeves conceives that the

2 Mr 376
D. 407
2 Bro Chy 44

the Consideration should not be primarily equi-
valent to the value of the article.

Can the Husband revert her Chose in Action?
No, unless he has been a Purchaser of them,
which happens in Equity when he makes a
complete Settlement on her and not a jointure
2 Vern. 501, which only binds Down before Marrying. —
Halsb. Ch. 168 In this Case the Chose, was his without any
2 Vern. 501 reversion to property or a gift, made for
a valuable Consideration. — A jointure binds
Down only, but never Purchases a Chose
in Action. A Settlement never binds Down
but Purchases the Chose in Action. —

Since the introduction of Ch. of Ch. it
is very common for one Person to have a
right in property of which another has the legal
title, as if 1000 £ be given to John & his Wife for the
use of his Wife Sally. When the Wife has prop-
erty of this kind and the Husband obtains
D. & C. — He must request the Trustee to pay it to
him or if a Chose in Action to collect it for
him; if the Trustee refuses the husband may
compel him to let himself sue it in the Trust-
ees name, by applying to a Ch. of Ch. which
will not lend it and unless the Husband shall
have made a complete Settlement on the Wife.

It does not however Genl. exact this if
the

the Wife appear in Ct and waive the settle-
ments, but should it appear that the waving
is not voluntary on the ^{part of the} Wife or made to pro-
cure family Peace, &c. or for a similar pur-
pose the Ct will still grant a Settlement.

3 B.R. 202.
2 D. 641
3 D. 12
Tollsh. Rep. 179
H. B. 549.
D.C. 669.

Should the Trustees however give up the
Chose upon demand the Ct of Chy. Cannot re-
quire a Settlement. but the Trustees may at the
price of their Conscience and the Settlement will
be good.

The Ct of Chy. Cannot prevent the Trust-
ees from paying to the Husband if they please
the principal or interest or even both. its
interference is only discretionary, and it may
exact any condition as the price of its interference.

Chy. will however sometimes order the Trust-
ees to pay the Husband the interest even with-
out the Settlement as a provision for the Sup-
port of the Common Family.

But if the Husband has already married a second wife with the first
and has made no Settlement Chy. will let the
interest accumulate with the principal in
the hands of the Trustee for the benefit of the
Wife.

3 Atk. 21.
2 D. 420.
1 B.R. 382.

The Assignees of a Bankrupt Cannot
obtain possession of the property, any more
than the Husband himself without making pro-
vision.

3 Atk. 240.
2 B.R. 638.
H. B. 718.

Marriage Contract provided for the Wife. But if the Chord
 Rev. Chy. 414 has been actually a signed "bond fide," and
 3d. 19th 11 for a valuable consideration Chy. will not
 2d. 11, 67, 120 compel a provision from such "bond fide,"
^{Contract}
^{Christianity} ^{Notes}
 2d. 11, 67, 120 actual signed.

Section 2.

A question of much magni-
 tude has grown out of this Law. The Husband
 under existing Laws is Administrator of his
 Wife's Common Account are obliged to disburse
 both the Surplus to the rest of kind, but
 what is the duty of the Husband as Admin-
 istrator with respect to her Chores not as need of pro-
 vision?

At C. E. He is obliged to disburse
 of her affairs. The any other Admin^{tr} for the
 payment of Debts in the first place and in

- 1 Echo 81 the next by C. E. He must disburse the Surplus,
 - 1 Echo 190 among her rest of kind. But it is Contended
 - 1 Echo 407 in some of the States that he is entitled to the
 - 1 Echo 871 Surplus. And by the mounted rights day some,
 - 1 Echo 378 But says "Judge Russ" if he be so entitled
 - 1 Echo 382 it is not to be taken ground. But from an English
 - 3. 11th 526 Stat^e which is adopted in each of the States.
 - 1 Echo 13 yet where it does exist there can be no question
 - 2. 11th 307 but the English Stat^e has no binding force here.
- because made after the emigration of our An-
 cestors; in answer to this it is said the Stat^e is
 in affirmance of the Com^{mon} Law, and here is
 the question, - from this I repeat -

I will now give a short account of Admors
situation, which being historical will throw
some light on the Subject — Vol 2 page 94
as 557 - 103.

The Administrator must pay the Debts.
and by the Stat 29th of Char^s 2^d need not
distribute the remainder of assets. If a ant 1
Ordin 331.
Stranger be Administrator he must pay over the
Surplus to the Husband & but a Stranger can
only administer when the Husband refuses. Vol 2 page 209

Every State in the Union has a Stat. Govern-
ed by that of 23rd of Char^s 2^d differing how-
ever from it in many respects. Under this
Stat the question "whether the Husband were
entitled to the Surplus," arose, and in order to set-
tle it, among other things was made the Stat.
29th of Char^s 2^d - This depended on the Principles
of the Court Law, relating to Administrators. —

The thing as "Parent's Petition," was entitled
to administration: the Wife in this Case was not
entitled to the "rationabilis pars," which was one
third, and the Children, another third, nor could
the Husband deprive them of this by his Will.
as to the remaining third the Husband might
dispose of it after the payment of Debts. — Second Volume
Vol 4 page 97.
D^o 85, 557.

But suppose the Husband made no
Will, what was then to be done with the Surplus?
It was to be applied for the benefit of the Son
of the deceased and as the Clergy were considered.

as the most proper persons for trustees of such,
property who acted on the faith of the King, and
were trusted with no more rights than the King,
they received it and appropriated it to uses that
they called pious. For the discharge of this
Trust they were accountable only to God, and
their own Conscience. In Case therefore of a
breach of Trust when a man was married, Wife
and Children were defrauded of their rights as well
as well as Creditors and that without possibility
of remedy. At length the Legislature began
to check this kind of abuse and in the reign of
Henry 2^d. gave an action to Creditors against
the Bishop, who was then obliged to pay the
Debts of the deceased.

1222-94-103.

2. Action, *Spousal*
387, art. 1
Co. Litt. 351-

By a Statute of Edward 3.^d
the Clergy were directed to appoint an Admin-
istrator, because it was more convenient to deal
with than the Clergy, the Administrator must
be the next friend of the deceased, and the Husband
being so to the Wife, a next of blood not being meant.
He was generally appointed in such Cases.
Hence then to see the Husband, acquired rights
of administering upon the Wife's Estate, having
an equal right with the Bishops.

Afterward by Statute of Henry 3.^d Adminis-
tration was to be committed to the Wife and
next of kin. This however was not con-

structed,

continued to have the Husband of his right of Administration upon the Estate of the Wife.

The Wife and him then distributed the Estate as the Clergy ought to have done. In some cases however they claimed to be exempt from any liability. In fact as were the Clergy with whom right they were invested.

A solemn decision was at length obtained to the surprise of every one that they were not liable!! the Husband was then free and more liable than the rest. Moore 864
Hob 83
191

After the termination of the Civil War a Statute of Charles 2. was made the Comptroller as distribution by the Administration. 4 vol. 2. 94-103
2089

From this view of the subject it is manifest that the Statute has rights not before given by C.S. but enforced the remedy the Husband was therefore bound only for any other Administration.

But by 29. th Chas. 2. he is permitted to retain the Wife's Chances in action of her the payment of Debts. and 1
Co. 2. 10251

This Statute says "Judge Rived." is clearly not in affirmation of the C.S. but attests it. Two several States there is no such Statute as 29. th of Chas. 2. and that Statute for the reason above mentioned is not binding in the U.S.P.

I apprehend therefore that in these States, (of which Massachusetts is one) the Husband must distribute the Surplus to the Wife next of kin.

In the cases on this Subject there has been no question in Massachusetts. Tho. has it not been for the Compromise on which the Husband goes up two thirds. It would have been decided that he was bound to distribute.

I shall add but one thing more with respect to the Wifes Choses in Action.

If an annuity be given her before marriage being an incorporated hereditament, the Husband can dispose of it at any time. Because it is not Personal but Real Property.

4 Collyer Rep. 31 Both the arrears that accrued during Coverture belong to her, as Husband, and those which accrued before Coverture are like any other Choses in Action in this Country, tho. in England it is given to him absolutely by Statute of Henry 8th not in force in the U.S.A.

There is one species of Choses in Action which requires a separate Consideration & that is when Judgment is obtained in his and his Wifes names, and either of them dies before it is collected. What becomes of the Judgment? Will it go to the Wife if he die first? Yes.

If the said first will it go to her representatives as any other Chas in Action? No
 it becomes his absolutely and he is not liable for
 it to pay her Debts at the administration. but what
 principle is this one exception to the General
 fund? or the doctrine of "jus accrescendi"
 because they are joint tenants do this judgment
 and of course when this doctrine prevails it will
 go to the Survivor. In some States the
 doctrine of "jus accrescendi" is applied which
 Judge Reeve thinks will soon be the case in
 all of them.

18th. 327
 18th. 179
 3d. 189

What will become of the judgment
 in this State in case when the Wife dies
 before Collection? In the other States the Hus.
 and Wife are Tenants in Common of this
 judgment. If we preserve the Law of Baron
 and Feme entire, he must account for it as
 Administrator, and consequently must collect
 it as Tenant in Common, and then he can have
 no more of it than he has a real interest in
 which is only to the amount of his Costs; for
 this is the utmost extent to which a Tenant in
 Common is entitled.

3^d Of the Wife's Chattels Real.

These are personal Estates in Lands or rather
 or Chattel interests in Lands which are.

Joint Tenancy - unsound because it is mis-
sary to constitute it that the title accrues at
the same time. which is not the fact in this case

Against the title of Joint Tenancy arises from
the act of the party, and not by the operation
of Law, as this title accrues to the Husband.

Also in Joint Tenancy the parties must have
the same kind and quantity of Estate which
is not the case between Husband and Wife in
her Chattel Real. She is entitled in her own right
during the term whereas the Husband may
only be entitled during Coverture. So that there
is scarcely one of the qualities of Joint Tenancy
in that title.

The Husband's right to the
Wife's Chattel Real, in England does not de-
pend on Joint Tenancy, and therefore may
subsist here where Joint Tenancy does not pre-
vail. This is well settled in this County.

If the Husband cannot derive away her
Choses in action neither can he the Chose in Chattel ^a ^{to} ^{be} ^{de} ^{cl} ^{ed} ^{as}
well Real; he may however make a lease of
them to commence after his Death; but in-
stead of giving her he must do it bona fide
for a valuable consideration. because this con-
sideration benefits the family.

Suppose the Husband leaves the Wife
Term and died how is the rent to be paid?

The Term would go to the Wife, but still the
 Cro Eliz 287. Reak to the Executor. The rule is the same
 Popham 8. if he cease the interest for part of the Term.
 Moore 342. because this is a disappointed "pote tant" and
 Co Litt 351 the Husband has a right to dispose of his
 1 Rolle 344 Term; the rule does not follow the revision in
 Plover 4187 Term as it does in Trechotes.

If the Wife is in possession of a Term.
 for Years and marries and alien. He cannot
 10. Mo. 104. dispose of it, because the Policy of the Law
 forbids his having any interest in Lands.

It has given rise to a great question whether
 a Term in trust for the Wife. not to be sold
 and separated and is governed by the same Equity.
 2 Cro. 30 whether the Husband has the same right
 Robert 718 to it as if the Wife had the legal Estate.
 Cro Eliz 287. The rule is now established that he has an estate
 Popham 11 it appears that it was designed for her separate
 Freeman 82 use, or intended as a Provision for her after
 his death.

A Wife before marriage conveyed
 her Estate in Trust for her use & not sold
 and separated, and the Husband did not in-
 terfered but she took the rents and took also
 Lands for the profits. did these go to the Hus-
 band 748 as Administrator, or in his own right?
 Hobart 3 in his own right, and J. R. thinks this Court
 has found are some Cases holding a contrary action.

There is a species of Choses which may be *Went 259*
levied on for the Husbands debts and that is *Pul Chy 1187*
Mortgages.

If a Female Solo. have Chattels Real
and is dispossessed of them before marriage, and
the Husband joins no possession of them. & in
the Court. they will go to him as to his
interest, and not in his own right.

George Read thinks where this doctrine of possession
does not prevail, as in many of the
States, they will go to the Husband. *Co. Litt. 351 D*

The transmission of Estates in those *2d. House 283*
States does not depend upon actual Seizin
or possession, as in England, the legal one
being sufficient. In some of the States
this doctrine of Possession, is actually ex-
pressed by Statute, and in others, implicitly.

The difference between the rules of
Possession in England and the W. & A. fre-
quently occasions important results at the bar.
Ownership alone is sufficient, and Seizin and
possession, not necessary.

If the Wife be dispossessed of Chattels Real
as an Executrix, the Husband is not entit-
led to them at all.

2d. Wm 389
3d. 41
1d. Chy 209
Co. Litt. 351

The next consideration is what right
has the Husband to the Real Estate of
his Wife?

The rule is the same as it respects Real right whether the Estate is in Fee Simple or Fee Tail, or for Life. — Offshore he has the usufruct during Coverture at least. This is an Estate for Life because it may last during Life, and has no determinate period. The Wife still has the Fee, as before Coverture. Therefore an injury done to the injured wife will entitle the Wife to an action, but one done to the possession, entitles the Husband alone to an action.

On the death of the Husband the Wife is again entitled to her Real Property. The Husband &c is entitled to the ~~benefit~~ ^{advantages} of them, if there are any.

If the Wife is first the Estate descends to her heirs but the heirs rights to take possession may be postponed during the Life of the Husband, if he has a Child born alive of her, that would have inherited the Estate. This interest during the Life of the wife is called her Courtesy.

The Child must be such an one as would have inherited the Estate, this will always be the case when the Estate is one in Fee Simple but when in Fee Tail Special it may be otherwise.

The Wife too must have been actually
seized, at C.E. during Coverture: but in this
Country, in many States, Seizin, is not
necessary; ownership alone being sufficient.

There is a term in England called,
"Gavelkind," in which it is not necessary
what the Child should be born.

In Conn. by Charter, all Land, and
"Gavelkind" but here females take as well as
males: but Courtesy has not been allowed
from what it was in England. Yet it has
been settled on the C.E. principle. To what effect, I do not
know. But Judge Reeve thinks it too. 3d. W. 329
not to question it now, and supports the 1st. 117.
birth of a Child necessary here notwithstanding 2d. 137.
ing the principle of Gavelkind.

It has been a question in England
whether a man would be Tenant by the
Courtesy of a Trust Estate, & to which all courts
the modern authorities say, Yes, that is of 11 Hen. 3. 98.
a Trust Estate not to be separated and in P

If a woman leases her Real Property
for Rent, and then marries, the Husband
is entitled to the Rent in view of the usufruct.
If he die leaving real in arrears ^{accounting} during
Coverture it will go to his Administrators.

The rent in arrears accruing before
Coverture, is like any other Chose in action,
which he must at C. D. reduce to possession
during Coverture.

But in England a Stat.
of Henry 8.th gives it absolutely, to the Husband,
which (like a Chose in action) will go to his
Executors after his death. 23

Of the interest which the Wife acquir-
es in the Husband's Property by Marriage
She can acquire nothing during Coverture,
but what will inure to her Husband.

She may however hold Property to her
sole and separate use. but this is not by
operation of Law.

On the death of the Husband,
the Law makes provision for her out of his
Estate. — If the Husband die intestate she
is entitled to one third of his Personal Property
after the payment of Debts. — If the Husband
Leave no issue she is entitled to one half.
These proportions depend on the Stat. of Dis-
tributions, which is adopted in turn in
most of the States.

The Husband may devise away his
whole Personal Property, if he pleased, for

for her right depends upon his dying in
testate of some of his property at least.

Paraphernalia

There are of two kinds
 1st The Wife's Bedding and Clothing suitable
 to her Condition in Life and this is absolute
 by law which can neither be taken for the
 Debts of the Husband nor be bequeathed away
 from her by him. —

2nd Jewels and Ornaments of any kind,
 suitable to her Condition in Life. — This
 kind is considered the property of the Husband
 in some respects — They must be taken for
 his Debts; and he may dispose of them dur-
 ing Coverture; but the Court bequeath them
 away on his death on that event it vests in
 her sub modo —

The Executor may take
 them to pay Debts but not until all the
 Personal Property is exhausted. — This kind
 of Paraphernalia forms no part of her
Portion under the Stat^d of Distributions.

The Ex^r has no more right to take them
 than a stranger who the Wife abandons them,
 they then belong to the first occupant.

The Wife holds them in exclusion of any

Voluntarily whatever (as Legatee) and if she is some
times a Creditor to her Husband in respect
of the Paraphernalia. - Suppose the
Husband mortgages it? he can dispose of
it absolutely if the years and the Wife's right
3. 11th. 2d. 3d. is entirely defeated - but this is not the case
when the mortgage is after payment of debt she
is entitled to demand it out of the Husband's
Personal funds. ¹⁴

Suppose then the Real Estate
devoted for the payment of Debt? - the Consti-
tution in England is the Judge does disapprove
of it, & that she can't be sold till the Personal
fund be exhausted - If the Wife's Paraphernalia
be taken for this purpose, she will have the
same right to resort to the Lands devoted to be
sold, by filing a Bill in Chancery that only the
Creditor could have done, on a deficiency of assets,
if she is Creditor to the H. in, for the amount
of the Paraphernalia thus taken from her. -

The rule is the same when Real Property is
conveyed in Trust for the payment of Debt,
whether the conveyance be by Deed or Devise -
She is a Creditor against the Husband in this
case, as in the former against the H. -

In England specially Creditors may resort
to the Land Chancery devoted to for the payment
of

of Debts. In this Case if the Creditors resort to
the Personal fund, and exhaust it, and the
Wife's Paraphernalia is taken for the pay-
ment of Simple Contracts, she has the same
rights to resort to the Land as the Lord Cud-
dell had in the first instance. She can resort
to the Land for the amount of her Parapherna-
lia if the Specialty Creditors could have resorted
to him for so much. She stands in the place of
such Creditors, - In many of the States, Real
Property is assigned for the payment of all the
Debts Not due at C. E. But even here the
Personal fund is first to be taken. What a
man may do in England the Law does
here. only that it is to be appropriated first if
it is raised. Thus if the Personal fund fails the
Ex^{or} goes to the Ck. settling his accounts and
requesting permission to sell Lands. In other
States they apply to the Legislature. "Quere".
In these States can the Paraphernalia be taken
before both funds are exhausted, they being
placed on the same footing only one is stated first,
I incline to think the Paraphernalia should
not be muddled with, till the whole fund ap-
pointed by Law is exhausted. When that is the
Case no question but they may be taken.

3d Wm 80mb
1st Wm 309
2d Wm 729
3d Wm 544

Thus far of the Personal Estate.

if the Real Property

Power. By the death of the Husband
the Wife becomes entitled to one third of her
Husband's Real Property, of which he would
die seized at any time, & under Coverture, and this
for her life. The most portable Estate
is in Freehold or in Fee. The cannot devise
it from her. Nor can her Power be taken
to pay her Debts, nor can she at C.D. deprive
her of it by any mode of Conveyance without
the consent of C.D. - By Alien is meant
only legal Alien, actual Alien is not sufficient.

It must be such an Estate as her Husband if she had had any might have inherited. This ceases only one Case in which she will not be endowed, or other, he has Lands in Tail Special. It is not necessary that the Wife should actually have Issue to entitle her to Dower, as it suffices to entitle the Husband to Curtesy.

P In Court the Wife is entitled
to Power in such Estate only as that of
which the Husband died Seized. *The*
has bought and sold during Coverture the Wife
has no Claim. - Hence it is unusual for her
for the Wife to join the Husband in Con-
veying *P*

Conveying Lands - He cannot have used & en-
 vied away to give the Wife of his Dowry
 nor make any conveyance in the nature of
 or affecting a devise (as a death bed
 deed) - Yet if he disposed her may have her
 of her Dowry by aliening it during his life or
 during coverture. D

The Wife at C. E. is entitled to have the
 Clerk assign her Dowry within a reasonable
 time, and she may compel him to do it. -

In C. D. the Ck of Probate appoints
 three persons to assign the Widows Dowry.
 by metes and bounds the Clerk having nothing
 to do with this assignment. This assignment
 is confirmed by the Ck with right of appeal
 to the H. C.

It is said the Wife of an Alien
 can't be endowed, and for a new proviso read
 down, for the truth is an Alien can't hold Land
 after Officiation, and consequently there is no-
 thing of which she can be endowed.

The Wifes right of Dowry may be barred.
 1st By sleeping with an Adulterer -
 unless the Husband be afterwards reconciled
 to her again.

2nd By settling a jointure on

on the Wife which is a Contract between
Husband and Wife before Marriage to have
Dower.

What is a Jointure? - ^{2d} 1st It must be of Real Prop-
erty and not Personal. 2^d It must be of
the Simple, Land or freehold. 3^d It must
be created in such a manner as that the
Wife shall be entitled to the enjoyment of it
immediately after his Death. 4th It must
be a Conspicuous likelihood of which the CP
must judge and to judge of that she must see Jointure and Claims
her Dower? That the CP alone can settle
and determine. She will not be holden if
she has made an improvident Contract
tho. she was "Sui Juris" when she entered
into it. This results from the Care which
the Law takes of her interests under Circum-
stances of this peculiar nature. Now it is
not unfrequent for people to be improvident.
3rd It must be made to the Wife, and
not to another person in trust for her.
4th And lastly it must be declared in the
Instrument to be "in lieu of Dower" or it
will not bar it, the Wife is still endowed
be entitled to both. But such Settlements
would be a purchase of her Chastity and

A jointure is sometimes settled on the²⁶
Wife after Marriage. - If it be done in
pursuance of articles entered into before mar-
riage, it will bar Dowry; otherwise not but
the Wife may have which she pleases, tho' she
can't have both the jointure and her Dowry.

There was antiently a method of endow-
ing the Wife of Personall Property ^{as returned 2 Novr 1577} ex coequo
eccliesie, such Property was absolutely the Wife,
but this mode is long since at end & appears
to be so by some old Statute now unknown

If the Husband devises Land to his
Wife "as Dowry", reserving it to be "in line & Heir" 3 Wils. 87
of Dowry - the Wife may take either tho'
she can't have both.

But if he devises "one
third of his Real Estate, to her during Life"
but does not say "in line of Dowry" - Can
she have both? - Judge Keble knows not
how it would be decided, but he thinks on
Principles she ought to have both, unless the
Husband made the Devise with the impres-
sion that the Devise was necessary to entitle
her to her third.

However the Practice in
Court has been to disregard the Will and
set off her Dowry as if no Devise had been made.

If the Deceased was of a certain parcel
as of 30 acres &c. She would then be entitled
to both - upon the whole if R. thinks ju-
stice is gen^{ly} done by giving the Wife in such
cases only two thirds.

Whether the Husband convey his Lands
absolutely or in mortgage ^{only} the Wife
Dower is not barred in any Case unless she
joins in the Deed of Conveyance. If she
joins in the Mortgage she may redeem by
paying the Mortgage money, if the Husband
tells her to pay it. Her proportion of it is
only one third. But if the Husband neglects to
redeem she may pay the whole sum
in which case she can retain all the Land
until the Husband pay her two thirds of the
sum she has advanced. When he does this he
is bound to pay her the Principal only be-
cause the use of the Land which the Wife
has had is equivalent to the interest.

Such is the English Law and probably
says of R. - Chief of the States Generally. It is
the Gen^l rule that whoever has a Life Estate
how ever great or otherwise may be his chance
of a long life must pay one third part of the
sum in order to redeem the Mortgage.

If the Husband mortgaged the Wifes jointure with her Consent. She may abandon her jointure. and return to her Dowry or if she claims her jointure she may redeem and hold it until the Heir indemnify her for the whole sum. And on her death her Ex^{ors} may hold it also till the money be repaid. because the sum paid by the Wife was altogether for the benefit of the Husband to reinstate her rights as they were before the Mortgage was made

There is one rule of the English Law of Justice against which the minds of the Chancellors seem to revolt. tho. they think it too well established to be gotten over. 1. The Wife can't be endowed of an Equity of Redemption. If she cannot it would seem to follow that the Wife of the Mortgaged might; but the certainty cannot. Then there is Land not subject to Dower. This has been much disputed.

Sir Joseph Jekyll determined that the Wife might be endowed of an Equity of Redemption; but the Judges would not assent. Considered as Law. and it is now otherwise settled. to the regret of all Lawyers and Judges. It is acknowledged to have been a strict adherence to

to a hasty decision that has deprived the
Wife of Dower in an Equity of Redemption
Notwithstanding that the Husband may have
Custody in an Equity of Redemption

Now says Judge Reed: when it appears
that the English Judges are dissatisfied with
the decisions that they are bound by them, in
such case I think that when the question is
raised here we should be justified in de-
parting from them and adhering to principles.
I think therefore that our Court would determine
that the Wife may be endowed of ~~an~~ an
Equity of Redemption. because it is confessed
by the ~~Real~~ property, therefore principles would
require it. I find no decision in this
Country except one in Court deciding the
Wife can be endowed of an Equity of Redemption

24
The Wife was once said to be endowable
Chanc. 450. of a Mortgage, interest; but this was when
Chanc. 160. Mortgages could be supposed to transfer the legal
title in the Mortgage.

The Husband's right to Property ac-
cruing during Coverture and also his
right to damages for injuries done to
the Person of the Wife during Coverture
Go Read

To Read Property he acquires the same right
and no other than he would have acquired if he
had held it before marriage.

If a Legacy be given to the Wife, without
any thing declaring that the Donor gave it to
her separate use, or if she receive any thing
under the Stat. of Distributions, or Personal
Property be given to her in any other way, as
a Bond &c. &c. all these belong to the Husband
absolutely, and not as Administrator.
They do not go like her Choses, uncollected, on
her Death: but if he dies they go to his Ex^{ors}.

These rules however are questioned, and it
is said by some that they go like any other un-
collected Choses, in action. It is not however
decided that the Husband could not sue
alone. Yet it is agreed on all hands, that the
husband can
institute a suit in his own name, to recover
such Choses, as accrued to the Wife during Coverture.

But it is admitted that he cannot sue alone,
for her Choses in action belonging to the
Wife before marriage.

And the cases in support of the
opinion that these Choses will survive to the
Wife on the death of the Husband, without
collection on his part. &c. &c.

Just as Read, & mill it has been so decided.

page 111-2
Co. Ed. 351
Reynolds 16, 357.
12th Apr 190
Vol 2 208-9

W. 575
22nd 497

and upon high authority, but it was evidently a misapprehension in the Chancellor and the cases he cites will not support him. -

For the other opinion which Judge Reeve ^{Con. Dig. 555} conceives to be the true one see ^{Con. Dig. 555} where the cases are cited. - If they are the Wife's property, how can the Husband sue alone? - And if like all other choses in action how can he take them by survivorship or her death? -

Now that is a question about which we can reason very little or none. Yet Judge Reeve takes Congress to be the Court's authority, as it preserves the symmetry of the Law. and Judge Reeve says he takes an important rule to guide him on that subject, to be 'that which destroys the symmetry of the Law may be pronounced to be incorrect, and that on the other hand which preserves the symmetry of the Law is correct.'

page 142

There is also another reason in support of this principle, which is that the Husband may recover their choses in action, in his own name ^{see Jo. 200} and need not join his Wife with him in the suit. The rule is the same if provision be made to pay the Wife for services rendered by her. It belongs to the Husband absolutely, because he was entitled in his own right to the services of the Wife.

The Elementary writer pretends to give reasons for this rule, but weak and inconsistent, and con-

ing

tending only to mislead. Such as that the Hus-
band and Wife are one. Therefore he sues alone.
But says Judge Rolfe if both forms but one person
both of Course should sue against. That the
Wife is alone is suspected in Law during Coverture.
- but if that be the Case a promise made to her
alone, could not be said upon even by the Husband
because the promise was in the eye of the Law made
to nobody. - These are figurative expressions, leading
to error. -

Now will be considered the right
which the Husband has to damages accru-
ing from injuries done to the Wife both
before and after marriage. as by beating
her person. Slandering her reputation &c.

The Husband in this Case must join
his Wife with him in the action whether the
injury was done before or after marriage

For all damages accruing to her from
injuries before marriage the Husband is entitled to. and if the Effects thereof during Co-
verture they become his absolutely. if a R. or C. 501
the death of the Husband they are divided 500
to her. If the injury is done during Coverture 119
the rule is the same. But in Case she dies C. 500, 90
it will undoubtedly go to her representatives if 185 or 185.
it can survive. But this is a kind of action
that does not survive the person who is
the

this Case it could not survive to any end.

The Wife is entitled to Support money. because for injuries of this kind is a donee in ing. Conjunctured two actions arise. One is the Wife for the injury done to her person. and a separate action to the Husband in his own name for the damages he has sustained in the loss of his Wife's Company and Service.

16 Alt 200 Calced. in action of Trespass. Per quod servi-
 12 Reins 140. tuim amissis. on dine the plate and pos-
 13 Reins 2340 ish ing of Charles 2^d. per quod Cor-
 14 Co 501 Sortum. amissis. so also any expense which
 2 Rolls 530. he may have been at is recoverable in this
 15 Sho 97. action.
 + Reg 979.

The Husband is also entitled to all the property which his Wife obtains by means of her Labour or Skill. or any act by which she acquires property. — Therefore has an interest in the Labour and Person of his Wife. and if any body seduces or takes her away from him she has an action against such person to recover damages for the injury he has sustained.

But on the other hand the Wife has no right to the Services of the Husband and cannot maintain an action for the loss of them. —

Next will be considered the Injury. —

and remedy in Cases of Crim Conv. with
a married Wife.

The action to be had in such
Cases is Trespass &c et damnis that the Wife
consent; because the Wife is considered as hood
no wife of her own Yet in truth it is an
action on the Case for damages for the seduc-
tion of the Wife, and she grounds for damages,
are 1st The alienation of the Wifes affections, -
2^d The inducement thrown on the Husband,
3^d The tendency to impose on him a ruinous Wid

Formerly it was holden that there must be a
recovery at all events: but it has lately been
settled that if the Husband is living with so-
much as gives his assent to it nothing can be
recovered.

If the Husband and Wife agree to se se se
live separately and articles of agreement are
drawn and signed by the Husband Counsel
maintain an action for adultery committed
after the separation, for he has consumed all
rights to his person. - These circumstances will
defeat a recovery, other only tend to lessen the dam-
ages, such as the Wifes former unbecoming and de-
graded Character, &c In this Case in order to
entitle him to damages the Husband must prove
the Marriage, as reputation is not sufficient proof
in this particular instance as in all other
Cases it is

27
D^o 87 or 97
W. Rep. 551
52 D^o 357
W. Rep. 182
D^o 183-4
last. ch. 2, perhaps
in the Wifes
to avert her if
Dow. -
H. Rep. 2057
H. Rep. 632
B. 8. 238
D. 183-4
B. 8. 238

It is unsettled whether a man can com-
mit a Rape on his Wife when living separate
under articles of agreement. Judge Keble thinks
he can, but Mr Gould thinks he cannot.

Of his power over her Person.

There is no settled rule as to what this power
is, at the present day. Formerly he had the same
power over her that he exercised over his Servants.

But during the reign of Charles 2^d Wives
began to be considered as worthy of better treatment
and during that time have been treated in a kinder
and respectful manner. The lower Class of people
in England still claim the right of Chastising their
Wives - this is not however the Case among any
Class of Citizens in the W. I. A.

Stat. 875.

Stat. 874.

1 Vict. 113.

2 Geo. 1138.

2 Stat. 1207.

3 Geo. 1138.

4 Geo. 1991.

It is held that if the Wife, leaves with-
out Cause, the Husband may seize her, and
bring her home. And it is also said that he
may imprison her to prevent her going away
with an Adulterer, and also to prevent her from
dissipating his property, or if she is insane.

But if the Husband have ill treated
his Wife, the Ct will not take her from her
friends, or whom she has fled for protection.

The Husbands Liability, to pay
the Debts of the Wife. - P P
By Marriage

By Marrying the Husband is liable for the
 Debts of the Wife provided that they are Collected ^{3d. Wm. 3. 80.}
 and during Coverture. and that whether he receives ^{3d. Wm. 3. 80.}
 any thing by the Wife or not. If the Wife ^{3. Mod. 180.}
 dies without any Charge before the Debt is Collected ^{Walt. Exp. 173.}
 and the Creditor is ousted of his right. But ^{page 67-70}
 if the Husband dies the Wife still remains
 liable tho' she had no property.

The Debt of the Joint Debt is not considered
 as transferred to the Husband by marriage & for
 we know the Case the Husband would remain lia-
 ble after his Death and it would not be un-
 law to join the Wife in the Suit. Whether it
 has a liability to pay the ground of his liability.
 for then ~~the~~ would remain discharged. ~~cost~~
 after his death which he is not. The
 reason is "Says just & Reason" because she cannot
 be imprisoned without him and as her Estate
 belongs to the dominion of her Husband she
 having nothing to pay with must go to prison.

Thus we see out of two Cases however when
 the Wife may be taken without the Husband
 &c. when the Sheriff is looking for both and ^{2d. Wm. 1107.}
 but the Wife first and claps her up. until he ^{3d. Wm. 1272}
 can find the Husband this is allowed to be. ^{1st. Wm. 1234}
 even had if the Husband has got off entirely. ^{3d. Wm. 1280}
 the Wife must be released. Where they are both ^{1st. Wm. 49}
 on the way to prison and the Husband is taken. ^{2d. Wm. 395}
 she

She may be discharged and Comand laid. i.e.
no bail to be except John Doe & Richard Roe.
Supra. She may be bailed and he not. But he can't
be bailed and she imprisoned.

The Jew. You suppose that is what the Wife
is not to be imprisoned without her Husband.
Exceptions and (as a broad) When they are looking
for the Husband they may take the Wife and
till then can find him. When the Husband
breaks Jail they may take and keep the Wife
until they may look for him. But if they
can't find him they must let her go.

page 71

When a Woman marries after judgment given
she may be taken alone. But what the
Courtship Ceases, all these rights determine. —

There is a Case which appears to Contradict
the rule that the Husband is not liable
after Coverture for the Debts of the Wife.

That is where they are both sued and judgment
is rendered during Coverture. but the Wife dies
before Execution. The Execution may then go
against him. but this is no exception to the rule
because the fact is that by the judgment
the Debt has become the Husband's own.

The Husband's liability for his Wife's
Torts committed before Marriage. —
H.

If a man marries a Woman who has committed a Trespass. He becomes liable for the damages if collected during Coverture for he took her "cum onere". So far it is paid only as with her Debts. But if she sued for damages and recovered. It may be a question whether he is liable as Administrator. ^{1. Leonard 312} he certainly is not as Husband. and I think ^{1. Rolle. 5.} he is not as Administrator. for it is a personal Tort and dies with the person who committed it. "Actio personalis moritur cum persona" is the rule in all personal Torts. —

Her Wrongs or Torts committed after marriage. — If she commits a Wrong after marriage by his order or in his presence. She is not liable but he alone is considered as having done it upon the ground of jointure Consideration of the Husband. He will not then survive ag^t her for the Husband only is liable in his own right. This is a solitary instance (i.e. between Husband and Wife) of Coercion excusing a Tort. For if a Master commands his servant to commit a Tort they are both liable and it holds generally that coercion is no excuse. If the wrongs committed by the Wife be not in the Husband's presence, but against his Will she is liable.

^{1. Rolle 251}
^{Leonard, 132}
^{Coolidge 270}

and she must be joined with him in the action
Super. during Coverture. But after Coverture she alone
 is liable, precisely as for a Debt due by her
 before marriage.

The Wifes Offences against Society.

Where
 the punishment for the offence is working
 more than ^{temporally} civil, the Husband is as much
 liable as if it had been a Debt of his, the
 process is in fact civil.

But if the offence subjects to imprison-
 ment, or Corporal punishment, she
 alone is liable, to be prosecuted & punished
 without the Husband.

If the Wife be fined for a Riot, Trespass
 or any other offence where the punishment
 is at the discretion of the Ct. the Husband
 will not be compelled to pay that fine.

The discretion is between a ^{penally} fine and
 a fine. A Penally is where a fine is im-
 posed by Law. A Fine at the discretion of
 the Court. In the first case he is liable
 in the last case he is not, and she may be
 confined in prison alone for the fine.

It is generally held that the Husband is li-
 able, to perform those duties which were
 in

incumbent on the Wife before marriage

Thus as a Widow is bound to maintain her Children. if she had property. so if she afterwards marries her Husband is then bound to maintain them. But if these Children were Paupers, and maintained by the Town he is not obliged to maintain them for here the Wife was under no obligation to maintain them. being unable. If the Children had property, of their own. but the mother maintained them. spontaneously out of her own pocket, he is not compelled to maintain them.

There is an exception to this rule of maintenance, which is unproven & stated page 292 parents and Children, "viz. That Sons in Law are not obliged to maintain their if pauper Parents in Law tho. the Wives were obliged to maintain them. being their Children, -

I suppose the ground of the exception is the preservation of domestic tranquility. 15th July 190. If for the Husband would get over and throw. It is true to be sure!! I discover no other reason.

A Case in 4 Term Reports 118. is where a Husband was obliged to maintain his Wife Child by a former marriage The Ct determined how as not on the authority in Strange (supra) that he was not bound to maintain. 15th July 1187
See 1 Selw 290
1st ed - 8
L. 1000

supra 292.

maintain her Wifes Parents. — But says
 suppose I should doubt the application
 of this Case to the one in T. Reports. is it
 I think it cannot be an authority for this Case
 If the Child has property the principle of the
 Case is good, but if it has not then it is not
 to maintain it, and not principal in the
 caption. I think the Case in T. Rep.^s is not
 good because it is a gen^l rule that the Hus-
 band must discharge the duties incumbent
 on the Wife before marriage. It was incur-
 red on the Wife at Court that to maintain her
 Children but not to maintain her Parents this
 liability was imposed on her by Stat^o — the
 Court said duties of the Wife necessarily go to
 the Husband by Marriage and I do not know
 a single exception. He is excused from this
 duty imposed by marriage only by reason of
 the policy before mentioned.

In the 1st Edition 114 there is a Case in
 which it was resolved that the Husband
 must maintain the Wifes Grand Child after
 10 Ed² 114 her death This is a solitary Case. — he was
 certainly on Gen^l y^o imbecile & debled during Co-
 verture. but this Case says he must provide
 for it after her death It is therefore an excep-
 tion to the rule

If the Wife commits Crimes, where
not under Coercion. she is as liable as anybody
but the Law will go far to presume Coercion
for Facts. But where the offence is malum
in se, the Coercion must be proved.

God if the offence be against Property only. ^{1 Hawk 2.3.}
be it ever so obvious, Coercion will excuse her. ^{1 Hale 45.}
and make the Husband liable. — But ^{D. 40. 46.}
if the offence be malum in se, Coercion
will not excuse her. e.g. If she commit
a Murder or Treason. Coercion will not excuse her.

There is one case however where the Wife
is punishable tho. under Coercion. viz. where
they both keep a Brothel. —

The Wife can't be an accessory after
the fact where her Husband has committed
a Felony, tho. she maintains, secretes and assists
him to escape. she is entirely exculpated from
guilt — But she may be an accessory before
the fact.

This exception, from being accessory
after the fact, extends to no other Civil relations
So a Father is not excused for assisting his
son, after the fact to get him away. And
indeed the Husband may be an accessory after
the fact, for an offence committed by the Wife.

Justice Blackstone thinks the reason of this exemption from
the Wife to her Husband had its influence in settling this point.

There are certain Contracts entered into by the Wife, which bind the Husband — D

It is an indisputable rule that the Wife may act as Attorney to the Husband and of course every act which she does in pursuance of a power of Attorney is binding on the Husband — This is the first Class of Cases.

The second is when the Wife Contracts concerning those things, which she has been accustomed to buy and sell to satisfy. She acts as his Servant, and his subsequent ratification furnishes evidence of his agreeing that she should do it.

In the third place when a Wife by the usage of the Country has been used to make such Contracts, the Husband is bound by them, as when a Wife purchases at a Merchant's articles proper for herself or Children — these articles must be adapted to her Station in life not extravagant or superfluous — but if she purchases Elips, or Dress, or which it is not customary for Women to buy, the Husband is not bound. But if he has been in the habit of buying low bargains, no matter how, and if such bargains may be, he will be bound by them for the Seller is justified in procuring his Consent; he depends in some measure upon her wants in life.

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Fourthly. The Husband is bound by any Contract of his Wife, no matter of what kind if such article purchased comes to his use and benefit. No matter whether his Consent was given or not, he will be bound by her contracts even if she gave more than the thing was worth. The Law raises an assumption upon this ~~Contract~~ ^{Contract} that all that is meant by this assumption is a liability for taking the benefit of the purchase.

Fifthly. another ground on which he is bound. That what he is unable or disqualified for contracting himself. The Contracts of the Wife will then bind him from necessity - as when the Husband is absent out of the realm, or if he be a Lunatic, or Sick in bed. 10 Ed. 1. 127. in such cases the Wife must conduct the affairs of the Family, and the Husband's Concerns, and in such case a Contract for a year or more or any thing that is necessary to the Husband, business binds him.

Sixthly. The Husband is bound for the necessities and such articles as are necessary and proper for her. Situation in life when he does not provide for her. This does not depend upon his Consent implied, but upon his Duty to do so, - Nay when he refuses to provide for her, and neglects her.

her out of doors, or forbids all the World trust-
ing her, or even when she leaves him with
good reason for so doing (as above), he must
pay for her pains, which she takes up.

32 But as a Gen. Rule the Husband is only
bound to maintain his Wife at home, and
to give her sufficient reason to go. So
that if she leaves him upon no ground, he is
not obliged to maintain her, unless he re-
fuses to receive her again. But when he
thus receives her she does not "pro facto" re-
assume all the Privileges of a Wife, for he
may justly refuse to let her sit at his table.

If she elopes with an Adulterer he is not
liable to maintain her, even if she offers to
return and he rejects her apprehension. But if
he receives her, this restores her right to bind
him by her Contracts for maintenance.

page 400, There is one Case on this Subject
which I think is not Law, which says —
that if the Wife elope with an Adulterer,
and Contracts for maintenance the Seller being
ignorant of her elopement, the Husband is
not liable for such Contracts. This is an
anomalous Case. Analogy contradicts it,
for when a Servant "cedit paribus," takes
up goods if the Vendor is ignorant of this, —

Stag. 9, 54
D. 700
65 Rep. 603

Servants being turned away, the Master will be liable. The case above is similar to this, and I think it cannot be supported. The objections against it are strong, and the point upon which it was decided fails. —

The fact of A's return alone will not discharge the Husband, if he continues to live with his Wife. But she may bind him as strongly as ever. In *Peller and Bosanquet*, 120, there is a case on this subject of this kind, viz,

A Wife lived in a state of adultery, and *Bos. & P. 220*, instead of her eloping, he eloped, and left her in his house, after his elopement she continued in adultery, and took up articles upon trust.

The question was whether he was bound as to the debt put it upon this point. Whether she diff. knew of her husband of living, that her Husband had eloped &c. &c. — thus making no difference between his going off, and her going off.

Wife will feed him in either case, but no proper notice given he is liable.

I have before mentioned that if a Man elaps. She forfeits her Dower, but if he *6. Mar. 171* unites her again her right to Dower is restored.

It is common in England for Husband and Wife to separate upon mutual agreed terms. As the Husband in such case bound

by
D

by her Contracts for necessaries. I presume
 a mere Separation without articles is not
 meant, as this will not discharge him. But
 when there are articles, it is a great question
 18 Ark. 1107 whether the Husband is liable. Where the
 4 Burr 2177 is provided for by a separate maintenance
 the Husband is discharged, if the separation
 is a matter of necessity. See Marshall
 & B. Patton, 7 Term Reports. here his liability
 for necessaries is taken away for the
 Articles are such that he can't take for earnings

It is said that a Husband can when
 11 Mod. 171 his Wife lives with him may forbid a par-
 2 Show 283, ticular Person from trusting him. But he
 can't forbid every body, and where owing to
 the prohibition, the Court provide, itself
 says the prohibition is void.

I will here mention a Case which
 has been a matter of much dispute, it
 is said in some authorities that where
 the Wife takes up necessaries, and sells them
 the Husband is not liable for them. —
 Judge Keene thinks on principle he ought
 to be bound. It would be a hard Case upon
 the "bona fide" Vendor. Who does right in giving
 the articles to the Wife. — If the Husband was
 liable only on the ground of his Consent;
 etc.

it would be a good rule. but the fact is he is liable upon other grounds. The Wife was authorized upon the supposition to make the Contract. He was therefore liable when the Contract was made, and no Subsequent in Talk, 118, proper Conduct of the Wife ought to discharge him. and surely it is not the duty of the Seller, to see that the Wife do not abuse the confidence reposed in her by the Husband. If the Vendor knew the intention of the Wife then indeed the Husband ought not to be bound,

The Wife can bind her Husband as Debtor unless properly authorized to do so, even in those cases 170. Contracts which she is empowered to make, tho. Deb would be void tho. he would still be liable

There is another question. — Where the Wife borrows Money to purchase necessaries, and actually does buy them, there is a case in *Hutton* 105, *Grunt Report*, or *Talkers*. Which says, that the Husband is not bound at Law to pay the Debt tho. he is in Equity. If he is bound in one Case ought to be in the other. — *105*, *133*, *Talk. 387*,

There is one case where the Husband is not bound to provide even necessaries for his Wife, i. e. where she is committed to Prison for a Crime *2 Sider*, 10, *11 Mod.*, 138, *Went.*, 153, *1 Sider*, 44, *2 Fost.*, 113, *120*, *1000*

I shall now notice such Debts as are due to the Wife from the Husband before marriage or payable after marriage & payable after his death.

All Debts which may or do become due during the Coverture, or are due before marriage from the Husband to the Wife stand upon the same footing, i.e. they are all annulled by the marriage, i.e. they both belong to the Husband, as the marriage like any other choses in action, they are reduced to possession, and become his, i.e. they are as much reduced to possession at the Coverture as with. But a question is whether a Debt the evidence of which remains entire, after his Death, is binding upon the Husband's Executor? — This question must have arisen from an idea that the Wife's Bond had not been reduced to possession. But I conceive no such presumption can arise for in other cases where a Bond is found in the possession of the obligor, it is "prima facie" evidence of payment.

But if the Debt was not to become due till after his death it becomes a more interesting question. Equity has always —

Con -

Cas. 351

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considered such a Bond as a marriage settlement, and will enforce payment by the Husband &c. - But at Law it is suits of a doubt - The Wife is at Law, even at Law looked upon as a Creditor of the Estate, as much as any other person. The objection was that the marriage necessarily discharges the Bond. But this can be shown by the contracts between Husband and Wife. Vol 2 - 498

It is laid down in the Books that in such Cases, ^{Rep. 107} the Wife must go to Equity, as Law said in the 5th 12, relieved her but this opinion is disapproved -

In the two Cases referred to in the margin, ^{the two Chief Justices} Lord Holt and ^{W. 4} Lord Ray thought that the bond was discharged at Law by the marriage, but the ^{judges} in both cases decided differently. ^{Vol 2 480} It was binding upon the Husband &c. So that it still remained a question, &c

In the above case Lord Holt combated the opinion, But in a case in 5th 12, 381, ^{Vol 2 493} the question was at length settled and is ^{5th 12 381} now entirely at rest, that such Bond can be recovered of the Estate. It has always been looked upon as a Debt of a Subjunct nature, that in reality it accrued upon marriage and must be paid before any other Debt. ^{Vol 2 493}

W^o I see that a Wife who elopes with
an Adulteress loses her Dower and her right
right to maintenance.

But a Settlement made before mar-
riage upon her by the Husband will be
binding upon them in Chy. The only for-
feits such right to maintenance as the Law
expressly creates for her, and ^{not} those made
by the Parties.

Of Conveyance to the Wife by the
Husband.

A Conveyance of Personal
property to the Wife, is good & valid
because by marriage she has a right to
her personal property, absolutely, and the
avails of the Contract or Conveyance, is rest-
ed absolutely in herself.

But a Conveyance to her of Real
property, is good because she can hold this
in her own right - as to Real property they
are two distinct persons. - such Conveyances
would therefore be good before marriage.

But they can't convey by Deed to each
other after marriage. indirectly, because
they are married they are one person in the
eye of the Law, and can't convey to
themselves.

himself. But the reason is bad though the maxim is true for they are evidently considered two persons for many purposes. for the Wife can take Land by Conveyance from any other person. and even by descent. She may indeed take the profits but no more.

But the fact is that they are both capable to receive, and tho. the reason why the Wife should not Convey to the Husband is just, (being presumed under a Coverture) yet there is no reason why the Husband should not Convey directly to the Wife. for the Law permits it to be done thro. the "inspired form" of a third person. and I can see no sense in the maxim. — The mode of effecting a Conveyance to the Wife at Common Law. is by two Deeds, the Husband first Conveying to a third person who immediately Conveys to the Wife. But now since the Statute of Uses in England it is done by one Deed, by Conveying to a third person to the use of the Wife, when the Statute immediately vests the legal Title in her.

Co Litt. 112
Do. 187.
2 Rolle 788
Rowden 111
Dyer. 100.

Some of these States have a Statute of Uses similar to that in England. — But in those States, where there is no such Statute, the Conveyance must still be by two Deeds.

Properly either Personal or Real may be given to the Wife as her own. and it will enure to her sole and separate use but their words are not necessary to be made use of in the conveyance. But any that denote the intention that it shall be to her sole and separate use. will be sufficient. —

I will observe further as to the Contracts between Husband and Wife. that where the Husband permits his Wife to take a share in the proceeds of certain articles the share which he gives her is recognized in Chy.

35. Ref. 337. An unmasker Case in the 3 P. W. 337. establishes the doctrine that the Husband may as it were convey Personal Property to the Wife. The Husband paid to the Wife all she could make from, butter and eggs, on his Farm, and by this means she accumulated £100. and lent it to the Husband. on his death it was decreed to be paid to her by his Executor.

The Eq. of Chy. however will never decree the performance of an executory Contract.

On articles of agreement to live Separately. Had. for this doctrine may be received in other Country I do not know. but it must at some time be thus. blaw a footing.

Where they only

When they only agreed to part by parol
it is not binding, but the married rights exist
and either may claim the other.

There must be articles of agreement between
them, which are generally made through the
intercession of Trustees. This is proper, as it
enables the Wife to recover the Settlement made
upon her. She could not recover immediately
from the Husband. When the Husband Cov-
enants to live Separately, he is bound to the
extent of his agreement. Let it extend to what-
ever of the married rights it may. - If he
renounced his rights to her person, he can bring
no action for an injury done to it, or for
Cruelty, Coercion, with her. If he renounced her
property, the Court claims, or controls it. There-
by he is bound to the full extent of his Covenants.
However extended, and no further. If he only
covenants to live Separately, he only renounces her
rights to her person, and to any property which
she may acquire by her personal services,
but he does not renounce his right to her prop-
erty generally.

In a Case in the 8th of Modern
there were articles of Separation, and it was
held that there must be disposed before they
could Cohabit.

8 Mod. 22

A Settlement of property on the
D

Wife in articles of Separation. is merely voluntary, and does not effect the interest of Creditors of the Husband, and they may take it.

But they cannot take Statements made upon the Wife before marriage. For marriage is a valuable consideration, but when made afterwards, it is like any other voluntary conveyance.

If the Husband covenants to let the Wife have any Equities concerning her dower. Coverture she can have them to the exclusion of his right.

So if he covenants to renounce the right of her Real Property. she may convey away such Real Property without joining her Husband. This I think was decided upon substantial reasons, for no reason can be given why the Husband should join when he has no interest in the thing sold.

3. d. Ch. 514. A Series of decisions confirm the doctrine. 2. d. Ch. 514 cited above in the 4. Modern. where it was held D. 490 that the articles should bind both Parties. 1. Burr. 452 where both agreed to rescind the contract. D. 487. 542 and she may compel him to pay the main demand which he has covenanted to allow her.

3. East 383. Again in a modern Case it was decided that a promise made in contemplation of Separation is binding.

It is not now a matter of enquiry, whether such Contracts, should be enforced, through Policy or not. "Hæc Res Scripta" - There are advantages on both sides of the question. It has a tendency to promote Separation. Yet I am inclined to think that the doctrine ought to be enforced in this Country for tho. many objections may be brought against this doctrine. yet the benefits given to an innocent Wife, against the extravagances and profligacy of the Husband, more than counterbalance the evils resulting from it.

In the 2 Brown 384 "Ed Ballou" gives us his opinion on this Subject. He observes that if it be said that the Wife may be said alone after articles (and it would seem the way) - the Wife may be considered in all respects (except marrying again), as a sole agent. When the articles are off the Husband to unite her and discharge him from his liability to pay the settlement making that of the mutual agreement of the parties to ward the debts will do it.

Of Contracts by which the Wife may bind herself.

It is agreed by all that she may bind herself by sole contracts. Since Lord. M

Manassah went out of Court, his decisions have been contradicted. But these decisions of So Manassah I think introduced no new rule or Law as Henry says, but only applied to new Cases. But Manassah's decisions have been contradicted by nothing but Opinions and not decisions. The idea of their being overruled arose from the mistake of attributing wrong grounds to those decisions.

It is still a "quæstio vexata". Its uncertainty that when a question of this sort comes up the Ct and Bar are immediately divided.

It is a Gen Rule indeed, that a Wife cannot bind herself, and the grounds upon which she cannot are two. 1st The right of the Husband, to the person of the Wife, such he would lose if she could bind herself and be put into Prison. It may be laid down that any contract to the issue of which may im-
 prison her is void. 2nd The Wife is supposed to be under the power and under the coercion of the Husband, and therefore on her own account it will not let her be bound by such contracts. If therefore we remove these two grounds of content she may make herself liable, i.e. if she can be imprisoned or is not under the coercion of her Husband she is bound. We have then only to bring the
 cases

Cases to this test,

Cases are to be found in the Books where the Wife was bound for her Contracts during Coverture. - In the *Wisey*, 200^d Lord willoughby says "the disability is not for want of discretion. but because she is under *Coverture*." - Thus if the Husband be banished into the realm - the Wife may be bound by her Contracts. this has always been admitted to be Law and I think demonstrates that marriage in itself is no disability. I know that it is said by elementary Writers that he is "civiliter mortuus," but I see no denial in this reasoning. for if he was considered dead. then his Wife might marry again. but it is confessed that in this case she can't.

It was once a practice that a man who had escaped to a Church. and absconded the realm. might go off. - So where the Wife is the Wife of a man alien enemy in both kind. Can the Wife might bind herself by her Contracts. this case is an extension of the principle. in the last case (viz. banishment). but has never been contradicted.

It was afterwards holden that the Wife of a man who is transported for 7 years might bind herself. which has never been disputed.

Salk. 116.
Combr. 402
12th Rep. 147.
2 Salk. 540.

12th Rep. 299

12th Rep. 305.

We now come to the Cases which have been
 grumbled at. This Case says that the
 **Wife* living under a Separated maintenance
 may bind herself. I refer to the Case of
Patent in 1 East.* On this question there is
 a great diversity of Opinion, and many deci-
 sions. That the rule which has been adopted must
 arise from some authority among the soundest Lawyers.

It is said to be taken by subsequent
 decisions. But opinions may have been a
 10. and it is a "Question of Law."

But says Judge Keble, if we examine
 the Case in *11 Rep.* on principle I think we
 shall find that it introduces no new rule or
 principle. But the doctrine was consistent
 with the old Com. Law. For the Husband's
 marital rights were not infringed at all
 as he could not send her prison. Nor could
 she be presumed to be under coercion. -
 It is a new Case to be sure but its principles are
 old.

Some Lawyers have contended that this
 decision in *11 Rep.* was on the ground of the
 Wife's having a Separated maintenance - but
 if so the Case was rightly cited tho' on a
 wrong ground. But, I think it the authority of
 Separated maintenance constitutes the true ground of the
 decision, for in such Case the Husband
 has

has renounced all right to her person.

Had there been only articles of separation ^{Printed} without any separate maintenance the ^{Laws p. 207-} same would have been the same. and this is proved by the case itself. for if the separate maintenance had been the ground of the decision, she would have been liable no more than the amount of the separate maintenance. But the Ct. held her liable to the amount of her Contract over and above the separate maintenance.

I consider it yet a question of enquiry whether the above decisions are correct. I suppose it will not be unprofitable therefore to enquire, whether and how far "previous and subsequent Cases to that of Baron Parry," are inconsistent with that Case.

The first Case bearing on the decision in the Case of "Parry" is the Case of "Walsh v. Deane" 2 B. & P. 1079 and Bradley. A married Woman was sued. She pleaded "Coverture". The P. stated an elopement from her Husband, that she had signed and separately, and that the articles were furnished her at her own account. The replica- ^{contra 1123. 1158. 173.} tion was held ill and the plea of "Coverture" rejected. The elopement from the Husband is not a destruction of his marital rights. He may reclaim her when he pleases. The

She never can by her own acts deprive him of his marital rights. Consequently this does not oppose the Case in Dunford v. Dant. There were no articles of Separation between them and therefore the marriage Contract was good and valid and consequently the Husband liable. (1)

In 2 Bk. Rep. 1995 there is another Case to this effect. There was a separate maintenance but no Covenant depriving him of his marital rights. In this Case I admit says Peru; that the separate maintenance did discharge the Husband from liability, but does not defeat the marital rights and therefore she can't be sued alone.

In 4 Term Reports 700 is another Case in which it appears that an action of Assault &c. was brought against a married Woman for Goods sold and claimed as which she pleaded Coveture. It appears from the application that the articles were furnished while she was in a State of Intoxication and yet the Plea of Coveture prevailed. Quarrel says Peru records - that the marital rights again subsisted and being a separated maintenance was no Covenant on his part to give up his rights and when his rights are good his liability continues.

In Turn Reports 570 - there is another case, different from the rest. They separated without articles, and a Suit was depending as to the equality of her Coverture. She was tried before a C.S. Ct. and pronounced "Cover-tured". Replication that the articles were furnished her in her own name, or on her own credit. - The demand in the replication was held good, and the Widow of Coverture prevailed - & in a sense the same reason still subsisted here. But here there was no resemblance between this case and that of "Palmer". I know that Henry was disgusted at the decision, but there was no necessity of his making such observations.

In Turn Reports 104 another case is reported in which I do not see much. The Wife separated from her Husband for reasons which do not appear, and carried on a trade by herself independent of her Husband and died having made a Will - a Suit was brought by her Husband - and the Ct. said the Wife could not recover. - But there was here no articles of Separation, and consequently no repudiation, and the Husband was still entitled to the profits of her labour and therefore the Legatee could not claim under her Will to affect the Husband's rights.

In 8 Term Reports 345. there is a great Case on which much reliance is placed and which they say overthrew the Case of "Polmutz". - But I contend that this Case does not overthrow that Case. but I suppose it did expressly oppose it. it is but Cases agt Case or rather one Case agt many. and that too decided by some of the greatest Lawyers in England. Truly wish to know that the question is not yet settled, not that it is settled as I contend it ought to be. - But says Judge Keble this Case is not opposed to this on which I rely. If indeed that were decided on the doctrine of separate maintenance this is opposed to them, but if as I believe on the articles of Separation, this Case may stand with them. The Case was this - the Husband and Wife separated and the Husband covenanted to allow her a separate maintenance "while she lived separate from him" - but either has a right to put an end to this covenant of Separation when they please there was here no Covenant which regulated the maintenance rights. all the effect of the Settlement was to free him from liability for her Contracts. Notwithstanding this decision & conceivably we in this Country are at liberty to settle the question as we please.

I will now consider the great Exception
to the Gen. Rule that a Wife Court binds herself.

The exception is that she may join with
the Husband in the Conveyance of her Real
Estate, only one point is to be regarded
here "viz" That her marital rights are not
affected.

In England the Wife can only Convey
by Fine and Recovery, but she could not bind
herself by joining her Husband in a Deed
But in the U.S. we have no such mode of
Conveyance, and a Wife may Convey by join-
ing her Husband in a Deed.

The Stat of Henry 8th has infringed on
the Common Law, by allowing the Husband
and her to join in making a Lease for three
lives or 21 years. 11 Coke 43,
Coke 2d, 53,

But a question is whether
when a Lease Court joins her Husband in a
Lease, such warranty in a Deed will bind
the Wife. It was decided that she is bound by the
Warranty, as she ought to be as much bound by
the Covenants as by the Fine.

Another question is whether articles of
agreement to Convey will bind the Wife. Vol 2 page 200
In the 2nd Revised D.D. it was decided that she
is bound to Convey according to the articles -
So also decided in Court of Errors.

But if the Husband does not join her
in the Conveyance, he can set it aside if he
chooses, and if he does not set it aside, it will
be a good Conveyance, and will bind her. —
for if it was an absolute Conveyance it would
bind him of the usufruct. & In these Cases
if Law no Objection is presumed, but the only
objection is if his intended right be affected.

Why is it that they are joined in the Con-
veyance of the Wife's Property? This Subject
will probably make a figure in our Op.

The Husband does not join in Conveying the
Land, because he does not own it to a full Con-
vey the usufruct, and his right to the Curtesy.
He joins to Convey the Land because it is
his own. — In all these Cases the Husband's
Consent is necessary, because his interest is af-
fected but where no right of his comes in
question, his assent is no more necessary;
than that of a Stranger. — When the Husband
renounces his right, she can do any thing.

But if the Husband's interest is the ground
of the Wife's disability, why do we not find in the
Books frequent Conveyances of the Wife's interest to
take effect after the Husband's interest is deter-
mined? The reason says Judge Ross is a
Mistaken Principle of Law, that a Freehold cannot
be made so common in future. —

There is another point on this subject. Suppose a Husband should dissent from the Wife receiving a power of Sale. Should she be by receipt. is this dissent binding? Can the Wife receive it notwithstanding? *D* When this question was first put to me I thought many cases might be found on the subject. I say *J.R.* but after the most mature researches I could find nothing but the general principle "that the Estate during the marriage coverts, vests in the Wife." *D* *D*

26 Nov 2907 But still the question remains "is it his dissent in it?" If she makes an actual purchase in the common course of the marriage may she defeat it, as the cases have decided. And says Judge Redue I see no reason why he should be allowed to dissent from a purchase and not a deceased Estate. For his marital rights may be affected in both cases. So to say that the dissent is sufficient where it depends on his consent this does not depend on a Contract, and the Law will void his Contracts. It is consistent with the principles before laid ^{down} that he should have liberty to dissent for in case of a Sale he may certainly dissent. Because the Wife cannot affect the rights of the Husband by her Contracts.

Of the Wife executing a power of Attorney. There is

There is no question but she may in another night, independent of her Husband, - where it is a new naked authority she may do it. But there has to be a question whether she could exert as power over Land, vested in her to be executed on a contingency, where there is something more than a naked authority.

When a Wife is a new Partner she may resemble a Wild in performance of the trust - so that she may in other cases be not

It has been said that if Land be given to her to dispose of to whom she pleases she may as well convey to her Husband as any one else - and this is true by Will or Conveyance. No one denies but that she may execute a more naked authority. What is given before or after marriage is then either with or without the consent of her Husband.

But it has been a question whether she can send a trust to Conway Lands on a contingency. — "Hargrave" the annotation of Coke, and one of the most eminent Lawyers in England says she can convey these Lands when the Contingency happens, even though she should be married in the interval between the conveyance and the happening of the Contingency, — the Husband & wife can incur no injury from this, other would if his agent was necessary

For of the Consent of the Husband was necessary, a Ct of Ch. Cant. cannot find to join in the Conveyance, as he has never made any Contract, nor has he any interest in the Estate.

I lay it down as Law therefore, that a Wife trusted may convey without the Consent of her Husband. No injury can possibly accrue to the Husband, and no body has ever questioned her power to act under a naked authority where no interest is vested. But "they say," - if sold she becomes a mere trustee. She has an interest in & before the performance of the Condition, but what difference does it make that she has had an interest when she becomes in effect a mere trustee?

Of the Conveyances of her Real Property by the Husband.

I shall now consider what will be the operation of a Conveyance by the Husband of the Wife's Real Property. - The Husband cannot convey his Wife's Estate in Fee, yet the Conveyance is not absolutely void, it will bind his own interests, because "omne majus continet in se minus," the rule which he the same in England (tho, not in this Country), tho, she should join him in the Conveyance, (except it were by Fine).

When an Estate is conveyed to Husband and Wife during Coverture, after his death she may disavow, and avoid the Contract. —

But if she disagrees during Coverture it is nothing.

So if a Lease is made to Husband and Wife and the Husband commits Waste and dies, the Wife may disavow if she chooses, but if she does not disavow, she is tied for the Waste committed by him. Co Lid 54^a

If the Wife joins with her Husband in this Conveyance she is bound. But in England, she would not be by any Conveyance.

But another name of Rent, after the Husband dies, will bind the Coverture. — The Position then that a Contract with a feme covert, is void, which we find in the Books so often disavowed. — For her Conveyances are not void, as she has the Power of Estate. — Lying the Coverture, but there is no need. Coverture may pay, and the Contract will be bound, by the acceptance of the Lease. —

But when they join in a Lease of the Wife's Land, and she ratifies the Coverture of her husband, if there is any rent in arrears it belongs to the Wife and not to the Husband's Executors. This appears inconsistent, but if the Husband had leased it alone, his

resp

6
Co. 2d 40. 13

representations would be entitled to the Rent
It must be then on the ground of her being
a party to the Lease, and this when the plain
case of Joint-Tenancy. — This is im-

portant as in some of the States have abol-
ished Joint-Tenancy, altogether, and in these
the Wife would not be entitled to the Rent but
the Husband &c.

If the Wife agrees to a
Co. 2d 25. Conveyance made to Husband and Wife, and
1 Rolle 249, being Coverture she makes herself liable for
all the incumbrances and rents due upon it

If the Wife takes a Lease when sole then
manies and the Husband undertakes to pay
the Rent and dies she shall be liable for
the Rent? This is a principle here

which occurs no where else in the English Law
for the Wife is released from her Contract &
the Debt for Rent is transferred to the Husband.
1 Devins 25
1 Rolle 351

After his death the Ex^{or} of the Husband
is liable and the Wife in her own act has re-
leased herself from the necessity of paying
the Rent and the Ex^{or} has been obliged to
ask his Consent to change his Debtors — This
is a solitary instance in the Law.

This is undoubtedly justified by Policy and
I amed it merely for the singularity of the prin-
ciple —

Of his power over her qualified Property.

Where there is a Contract with the Wife to take effect, after the Coverture is determined. He can't release this Contract. As where it contracts to give a married Woman £1000 after the death of the Husband, he can't release this, for he has no interest in the world in it - This point is not disputed. So where the Wife has an annuity the Husband has a right in the profits of this, but he can't release it altogether. He can't sell it or trouble it at all.

If an Estate is given to a woman upon condition; if the Husband neglects to perform the condition her Estate is lost it is her misfortune. It makes no difference whether the Estate is given before or after marriage. - Co Litt 240
2^d - 133.

But where the condition is not agreed upon by the parties, but is a condition in Law, his neglect will not prejudice her right, as in Estate upon Condition (impie), that the Tenant should serve as purveyor or soldier &c.

Now will this alienation in Fee of his Wife's Estate, amount to a forfeiture, tho, to sell a greater Estate than one is entitled to is generally a forfeiture.

In such Cases, he must sue with his Wife, and what not &c.

The cases don't exactly tally but one principle runs thro' them all.

If the Husband means to recover anything that will survive to the Wife, he must join her. Whenever she is the meritorious Cause of the action he may join her or not as he pleases, as when Sued for her earnings or the embezzlements of the Estate. What Effect has her joining him in these Cases (as if he were a Trustee or a Co-heir, &c.)? If he dies before it is collected, it will survive to the Wife. —

But when her Person or Property was not the meritorious Cause of the action, he does no more join his own Wife than his neighbours.

Whereas the action will survive to the Wife, as in an action for her Chose, he must join in the Suit. And where the Cause would survive against the Wife, he must be joined as Defendant in the Suit. —

Where the Husband must join his Wife and where he may or may not at his election, and also where they must be sued jointly. The general rule is, wherever the Cause of action will survive to the Wife, he must be joined in the action. Say Husband and Wife be ejected from Lands belonging to the Wife.

Wife both must join in the action to recover because it will survive to her on his death.

Any Contract made with the Wife before marriage must be sued upon in the name of both as a Bond or Note. Also any injury done to her property before marriage as trespass on her Land. Injury to her personal property. Person or reputation, in all these cases the Wife must join in the action because the injury occurring before Coverture the action would survive in her favour. And an injury done to her person or reputation during Coverture will survive to her, and therefore she must join. The rule has laid down & decided as unyielding and indissoluble. viz. that the Husband in such cases cannot sue alone. Some inaccurate Writers hold otherwise and even some Judges have incautiously supported this doctrine.

1 Ball. 20
1 Rol. 347
1 Prob. 533
1 Ed. 2. 25.
Cro. El. 419
1 Vent. 89.
1 Brown, 105
1 Rol. 300.
Cro. Jac. 501
1 D. 588.
1 Selw. 303

When the Wife person or property is the malicious cause of action. although the action be his exclusively yet he may join the Wife and sue alone as he does. So if a Note be given to the Wife during Coverture. he may sue alone. but she will not survive to the Wife unless he joins her. Who some have said it would.

page 49
to Gift 199
page 143
1 Selw. 300

The principle I advanced is that the Husband can never sue alone when the action will survive to the Wife. When property.

comes to the Wife after marriage (as a Legacy
 1820 308 it acts absolutely in the Husband and Wife
 not survived to the Wife. The contrary opinion
 is by some, near the dignity of the Law
 and I think cannot be correct. P

3 Devins.

Allen. Rep 30

In the 3^d of Devins. the Case of Howard 88
 May is cited to prove the rule that the
 Husband may sue alone in any Case. All
 In Allen. is another Case. But all the Cases
 on which the Debt arose. during the Coverture
 In 2^d of Allen a Case says he ~~and~~ join the
 Wife which implies that he may sue alone

The Case in "2 Devins." 107. is that Dispo-
 2 Devins 107 sition is taken from the Wife before marriage
 1 Swift 199 and converted after. The husband may sue
 1 Devins 311 alone. because the Conversion was made to
 2d 877 the property of the Husband.

In Vernon 309 is a Case cited to prove
 1 Vernon 309 that the Husband may sue alone. For Debt
 due to the Wife before marriage. But this
 was a Case of a Legacy given to her during
 Coverture.

In 3^d of Devins 21 is also a Case cited
 3 Atk. 21 but it proves nothing showing no direct
 mention to the Subject.

3 Vernon 676
 P

The Case of Gifford v. Bader in "Vernon"
 is the most cited and best so far from proper.

this it proves that it will survive to the
Wife, and that he must join her in such Cases
in to remove Choses and to give Coverture. But
that he may sue alone for those that accrued
after Coverture. The B of Modern states the
same thing. But the Chancellor holds wrong 2 Mod. 217.
fully that it properly accruing during Coverture
and will survive to the Wife, whereas the Case is
in fact otherwise. He also says that the Hus-
band may sue alone in this Case. This is
true, but he cannot not if it would survive to
the Wife. As to those Choses which accrued
after marriage the Cases all say that it is op-
tioned in law whether to join the Wife or not
in the Suit. Why is it that a Term
Court cannot sue alone to remove her Choses?
all agree she cannot. But it is to ascertain
the true principle. Some say that she does
not exist. But this is manifestly absurd.
nonsense. If she so sue alone it can only be
taken advantage of by a plea in abatement
this proves the unsoundness of that maxim,
and that she has a legal existence. For if she
had not the judgments would be void. This
suit says her would not hurt the Husband
I agree that he ought not to be sued for
alone. But if she can do he is entitled to the
money, if she collect it. But if the Husband

and after judgment given the Debt would
belong to her and to it would. Had the
Husband joined in the suit, entered before
Collection. If the Wife had no legal exist-
ence the settled case of a Husband being
absent. Wife. Could not be supported. Besides
if they are one the Husband could not sue
alone. - Some say the Coverture is a dis-
qualification. This is the principle I wish
to combat. If it would so Coverture need not
be pleaded in abatement. but might be
taken advantage of at any time. - They
say also that her existence is suspended dur-
ing Coverture; but the contrary of this is
shown in a multiplicity of Cases. -

The true reason is that it would be un-
just to sue the Defendant with a suit by
a person unable to respond in case she be
defeated, for she has no property of her own,
and she can be imprisoned without her Hus-
band, as this would be an infringement of
her married right. The Husband must
also be sued when she is because in order
to get the Wife by the Husband must
be taken also. Her property is liable for the
Debt not hers for she has none, and the Hus-
band in such case could not be taken upon
Ex^{ca} - upon a Judgment ag^t the Wife alone
For the rule of abatement sed 3d Rep. 627

When she is the meritorious cause of the action and on express promise he made to her she may be joined in the Suit and she not for the same reason as those cases. At least the Law implies a promise.

So when an injury is done to the wife of her Land is to the Husband who must be joined he is not obliged to join her tho. he may if she chooses. But if the Tort is done by rigging &c. he must join her.

If the Wife had leased her Land before marriage, by the marriage the Rent belongs to the Husband, in lieu of the usufruct and therefore he may sue alone for it. Yet he may join the Wife if he chooses. So when they both lease her Land (which Lease she is not bound to) he may join her in a Suit for the Rent.

There is one case when he may sue alone, to recover a Debt due before marriage. Viz. in case in Crooke James. 205. and others good enough clearly that the Husband may sue alone for the Rent accruing before Coverture tho. it would survive to the Wife. But we must observe that he does so by virtue of a Statute of Henry 8th which gives him such Rent.

When the

1 Siding 300
10 Sept 199
Siding 172
4000 150
15 Feb 114
Coo pa. 77
Belle 307
D. 317
3 Siding 403
Honor 82

Balt. 21
Palmer 207

Coo pa. 205

6
God. 20 351
Kent. 60
A. 83
Coo. 242

Case 399. When the Personal Estate of the Wife is
 Q^d 438, the Cause of action generally (especially after
 a *decedat*), he may join her in the action.

The Consequence of the Husband joining
 the Wife when he is not obliged to, is to give
 her the judgment by Survivorship, in Case
 he dies after judgment and before Execution
 or Collection. It is said that the latter is in
 the "jus accensendi," of Joint Tenants, if so
 then when there is no right of Survivorship, as
 in some of the States, a Question arises whether
 she would have this judgment absolute, or as
 Truited for the Husband's Ex^{ts} - ?

When the "jus accensendi" remains
 J^r thinks that the Wife would take it on
 that ground - and that when it is abolished,
 he thinks there is still another ground on which
 she may claim it viz "that the Husband in-
 tended she should have it." - I can conceive
 no notion which should induce the Husband
 to join his Wife. But that he wishes she
 should have the benefit of the "jus" in Case
 of his death. Before judgment collected, therefore
 it may be considered as a voluntary Gift and
 the Wife would not be compelled to account
 to the Ex^{ts} - This voluntary Gift however would
 be good only ag^t the Ex^{ts} and not ag^t the
 Creditors of the Husband.

There are Cases where the Husband can
join the Wife tho. she is the meritorious Cause
of Action. & at he must sue alone upon the
Special Damages, accruing to her as for a
battery of the Wife. "Per quod servitium amissum"
or for Slavery agt the Wife, when the Action
is absolutely his.

But it is said that there is
no Case where the Husband has joined the
Wife, upon an implied promise, as for her
Services as a Nurse, &c. &c. for an implied promise
is well well known to the Wife, but to the
Husband only. I think says Judge Reeve
he might join her if he chose. One can say
he cannot, but I see no grounds for the decision.

In the Case in 2 Vent. 195. there was a
difference of opinion among the Judges. Whether
the Wife could join the Husband in an Action
of "quare Clausura fregit" on the Wife's Lands.
I think the Court were divided. It does not appear
what was done in that Case. The general rule
certainly is that if the injury is done to the
Wife, she must be joined but if done
to the Husband, she may sue alone, or join
the Wife as he chooses.

Can any thing that belongs absolutely to the
Husband, survive to the Wife? Judge Reeve
conceives not tho. there are opinions enough
in,

in the books to perplex the question. —
 In the case in Cro. Jarner they decided correct-
 ly, that she might join with the Husband
 Cro. Jar. 17. But gave a wrong opinion that it would
 succeed to the Wife. I do not mind this case
 at all for the observations are copied in *discrepancy*.

In Cooke Charles there is also a case
 where an Estate is granted to Husband and
 Wife for their lives remainder to the Husband
 in fee. The Husband brought an action alone
 D. 199 for damage in not repairing he & his wife was a
 damage to the inheritance and yet the Pleas
 that the Husband might sue alone and so
 he may say Judge Alcock & Mann by this con-
 veyance by an unquieting rule of Law the Wife
 took nothing yet if the Pleas were right in saying
 that the Wife had an interest in the inheritance
 must be incorrect. But the fact is that the
 Wife here had no interest and therefore the
 action was well brought by the Husband agreed
 to the rule in *Shelley's Case*. where the Wife
 took nothing because the Husband ^{had} nothing and
 that is settled in all these cases.

I will now consider the Cases where the
 Husband and Wife must be joined in the action
 When the ^{Wife} ~~Wife~~ would survive against the Wife
 after the Husband's death she must be joined

for the Husband is sued at all only to take
 advantage of the Claim. which marriage has
 established against him. so that the Debt
 of the Wife are concerned. by Estoppel or other
 way. or for the Debt due from her before the
 marriage - Thus the Law considers her the D^r - 348,
 Debtors in these Cases. and if she dies her Hus-
 band. as Administrator. will be liable in the Debt
 same case as far as his affairs go.

When the Commitment is of the is in the
 company of her Husband he alone must be
 sued. - But if she is by herself they must both
 be joined. as it will survive against her.

I suppose the Husband and Wife are both
 beaten - then can't join in an action for dam-
 ages. to both. for in case she survives her Hus-
 band this inchoate right to damages belongs
 to the Wife. and would survive to her - the Hus-
 band must sue alone for his own battery. and
 they must join for that done to the Wife. -
 Rights to damages. are governed by the same
 principles exactly as any Cause in action.

2 Vent^r 29
 Cro Jac^r 85.

If the Husband and Wife Commit a joint
 battery. and are jointly sued if the Husband
 be acquitted the Wife must be discharged -
 tho the Verdict be against her which creates.

same.

Some possibly that Court will be got over, and so cover that this is not the correct way of bringing the action. The action should have been laid ag^t the Husband and ag^t the Husband and Wife for the battery done by the Wife for in such case both might be taken for the Wife's battery, if the verdict was against her, tho her Husband be acquitted for that Commitment (by him).

It is said that an action brought by the Husband and Wife for a battery of both will lie, and if the Def^t be found not guilty as to the battery of the Husband, but guilty as to the Wife, Judgment may go against them. Judge Reed says he knows not that there is any objection to this on principle, tho the action might have been a battery when they jointly sued for a joint battery.

Of the Wife's power to Devise.

Under this head I shall include all sorts of Property. The rules I have laid down as to contracts will illustrate this branch of the subject. If the Wife has property she consequently cannot devise. But I suppose she has property, is there any thing in Common Law to disable her from disposing of her Will?

We are not to look for any authorities in the.

the English Law on this subject & means by
 the Stat. 34th of Henry 8th She is expressly ^{22 Hen 8 379}
 forbidden to devise Real Property. But in
 Conn. she is expressly authorized to devise
 by Stat. and in several other of the States.
 The Stat of Henry 8th is adopted, and here
 therefore there can be no question.

But in some of the States there is no
 Statute and the Conn Law governs. The only
 question then is does the Statute of Wills
 in affirmance of the Conn Law? i.e. how
 is it at Conn Law. - I think there is
 nothing in the Conn Law to forbid her devi-
 sing Real Property. and that in those States
 she can do it. We will consider this ques-
 tion first on the ground of the Conn Law i.e.
 on principle and secondly on authority.

The result will be Suppositions for both.
 that she can devise her independent Real
Property when no marital right of the Hus-
 band is affected. this is the principle that
 governs universally.

1) Formerly there could be
 but few Devises of Land in Wills & caused
 they were not allowed at Conn Law but only
 practiced under some remains of the Saxon
Customs. - Yet in very old times & some Courts
 could devise the Real Property which she
 had.

held independent of her Husband, Read prop.
is not allowed to as no one in those days could
devise that species of property.

The point that she could devise her Personal
property which she held independent of her
Husband is clearly settled in the Books, and
this is as firmly established as any principle
of Law — But can she devise Real
Property? The Courts in England, the
Court of Henry 8th & later the Lord of Wils^{on} is so
positively against it as to prevent such Cases
appearing in the English Books.

The principle has been much lit-
igated in Conn. where no such Stat^{ute} of Wils^{on}
at that time existed. In the first Case here
the Probate decided that she could devise
on appeal the Superior Ct. decided that she
could not. but this decision was reversed by
the Ct. of Errors, & so some time it was
considered settled that she could. when a Case
arose by the Superior Ct. (by which they
reversed their own former decision) appealed
to remove all doubt for the Judges then
stated that the Law was settled on that point
viz that she could devise. Yet afterwards
the Ct. of Errors decided that she could not
At length a Statute was enacted impos-
ing her to devise which settled the question

We will first Consider it on principle
only regarding authorities. -

Some contend that at C. D. when ever the
Wife had property which was capable of
being devised and by which she might be
inheritor of the Husband would not be affected,
she might devise it. Others say, marriage
is a disability but says Judge Reed I see
nothing in the nature of marriage to make
an idiot of her or in any way to impair her
understanding. The relaxation of the Law.
some of them lead us to believe that she is
incapable of Volition. But this is absurd.
for in conveyances of her Real Property her
Consent is necessary to satisfy the agreement.

Again they say she has no Will but
the Law requires as well in her to commit
a Crime. It is also urged that it
would be dangerous, she would devise under
the Coercion of her Husband and his power
over her would compel her to devise it ac-
cording to his wishes. But the same reason
ought to apply to fines and other Conveyan-
ces of her Real Estate. But if these are al-
lowed surely a Devise ought to be. The
Husband has no more power over her or
a sick bed than she has over him. inhabilis
maritatus and at best it is not an objection to
her.

her Deviser made by her when in health.

It may be said that in Times &c. the Husband's name appears but in her Deviser it does not, but this is failed, as if he had made her to and had to devise two property the same had testament would compel her to join in a Deviser. It is certainly enough to give and her Person & property to the Husband without sacrificing her Head, also she ought to have it had her power to receive such relations, as had created her wife and not suffer it to go to an undivided wife.

I shall make no observations as to the imaginary guard of the English Law, to examine the Wife privately when she conveys, for there can be no shadow of necessity for it. When then may she not devise as well as convey, at least with the consent of her Husband.

But I contend she may devise without such consent. The reason why she cannot convey without the consent of the Husband is her right would be affected, if she could convey, in present - and she cannot convey in future - or by way of remainder, for reasons before mentioned. Still she may devise to convey in future, and therefore the Deviser would be subject to the marital rights, and could not in any way defeat them.

Let us now examine the Subject on legal grounds, and look at the Authorities. As Chas 3/19
If the devise the Husband's personal property 376
with his consent the Devise is good. his Year 1662
estate being necessary because the Property is County 5, 3/4
his, and also such Devise to be good. Beach Devise 34

Glancie and Beaton, two of the most eminent writers, lay it down that the Will of the Wife generally is not good, because say they in Rever. 111
most Cases it would be disposing of his property 111
and the interests of the Husband would be affected. 307
and by it This is certainly reasonable, and the reason given should be noticed, as if it had been her own, his Consent would not have been necessary.

Beaton then states that it was usual for the Wife to devise away her real estate, tho the Husband did not give his Consent, because 3 Revo. 9.
this was considered her own property, and mentions it as an exception to his general rule, and the reason why there was not more exceptions, was that the Wife at that time seldom had property of her own. But afterwards, when the Wife came Rever 105
to be endowed of personal property, as ordinary ecclesiastical, she could devise this.

This doctrine was laid down by Ashbush Rever. 18
at Stafford in the time of Edward 3rd he states

that she may dispose what belongs to her and
 suppose complains that it was attempted to be done
 away contrary to Law.

Lyttelton at a later period the most
 eminent Civilian of his time lays down the
 same doctrine and seems to think that any
 one should say that the Wife could dispose
 her own property that was designated as her
 Dowry, as a married settlement. It seems to be
 unmarked that the only objection urged by
 the combatants of this doctrine, was that she
 had no property of her own.

The Wife cannot dispose the Husband's
 property it is true without his consent tho
 she may with it. In modern times it is
 customary for Wives to have separate property
 by our Settlements. Sir Hardwick says
 1 Vesey 190 that doctrine that a Contend for, and says that
 in all cases a Wife may dispose of her own
 1 Vesey 303. property, either during her Life or by Will.
 18 Vesey 314 The same doctrine was advanced by Sir
 28 Vesey 78 Thurlow, who says a Wife may dispose of her
 2 Phillim. 315 property as well as a Tenant for Life either by Will
 12 Vesey 120 or otherwise.
 18 Vesey 118
 28 Vesey 315
 3 Phillim. 700
 18 Vesey 253

It is therefore no longer Contend
 ed in England that Coverture Intero creates
 an incapacity.

(End of it.)

But it is objected that there are all Chancery
Cases, and don't know that a Ct of Law will
recognize the principle. Perhaps there says
the rule must be the same in both Courts; it
would be absurd to have two Cts going upon
separate, and inconsistent principles.
and further I trust Chy has never assumed
the power to act as do. from Ct of Law.

In the Case in 1 Ves. 190, a Woman devised
both Real and Personal Property. The Devise
of Personal Property was allowed, but that of
Real was rejected, on account of the Statute
of Henry 8th. Why this distinction? Because she
was disabled from devising Land, by Stat. and
therefore Chy. Court enabled her. But if she was
disabled from devising personal property, at C &
Chancery Courts not enabled her for Equity Comedown
is as strong as the Stat. Law. When they
said she incapable upon the Stat. it clearly
implied that they thought no such incapacity ex-
isted at Com. Law.

1 Ves. 190
p

In the 2 Ves. 73 it is laid
down as Com. Law that a Shopkeeper devised Per-
sonal Property, with the Consent of the Husband
And since if she could not devise on account
of Coverture the Consent of the Husband would
not have been able to satisfy. For his Consent
could remove the disability, placed upon her by
the Stat. of Henry 8th.

2 Ves. 73,
p

With respect to her chooses in action, if
 the Husband survive he is not entitled to them
 1 Mod 311-12 therefore it would seem according to Lord Pain
 chief that she may devise them and it has
 been assigned in "Wooden" that she may.

Whether this right has been taken from her
 by the Stat 29 of Charles 2nd which gives the
 residue of her ^{chooses in action} to the paymaster of her
 her Husband is uncertain but it has no
 thing to do with this question. I am of opinion
 that the Wife ^{will} would defeat the right of the
 Husband. Wherein therefore she has property

22 James 2^d of her own she may devise it without the assent
 1 Mod 340 of her Husband. Unless she be disabled by Stat
 2 East 552 If any person be a Court she can
 1 Rolle 314 devise what she holds in another's right and
 2^d 105-912 we find that she can

The Wife's Devise of Real property
 We admit that the Wife's Real property
 belongs to herself she alone owns the fee.
 Why then it is asked do we not frequently see
 Devises of Real property to the Wife in the books?
 The answer to this is easy for unless the 3^d
 of Henry 8th was passed could a wife devise real property
 and by the Stat 34th of Henry 8th Two years after
 the Wife was completely disabled - it is not then
 surprising that we find so few instances of the Wife's
 devising.

Our Saxon ancestors certainly were accus-
tomed to wear Keads to support but whether a
Horned Crown could be said or not there is but
little light to be found. But the Roman
Law prevailed in the South of Britain for two
centuries, and as the Roman Law permits
Horned Crowns to wear, it is certainly reasonable
to conclude that the Saxons permitted them
to do so especially as they received the go. in in-
stead of receiving Whales from the Romans,
having before the Conquest known nothing of
Quarrels.

But there is something more than
conjecture on this point. Several Saxon
Customs prevailed and still the Jew. work and
were handed down in different Counties e.g.
Kent and before the Statute of Henry the 8th
empowering Devises. Wills were permitted in
these former Counties; and one of the former
Counties was Kent a married woman making a Will
a Will and this Will was held good. It was
made indeed with the Consent of the Husband
but there was no observation by the Statute that
such Consent was necessary and a woman
might have succeeded her Copyhold with-
out his Consent. In another Place in Deon-
and her Devises was held good tho there was no
assent of the Husband.

2 Brownlow
1 Deonard 18

In *H. B. K.* there was a case of Separation. Between Husband and Wife. The Surrogate had Estate to the use of her Wife and said the question was whether the Decree could hold? This Will was not held to be a Decree but only a species of conveyance, making the Charge of the Copyhold Land in this way Copyholders could always be coerced, notwithstanding the Statute of Wills has it added her from reviving.

But considering it as a conveyance the reason of the Objection that no marital right of the Husband was affected by it and therefore it was established. The General Conclusion then is that as the Saxon allowed their principles of divorcing from the Romans and the Romans permitted *Tene* Courts to divorce and as we find married women divorcing in those Countries, whose fragments of Saxon relics are to be found, that the Saxon Law permits *Tene* Courts to divorce.

Another argument may be urged with great force. It seems to have been in Common Practice in England for a married woman to divorce her "*rationabilis pars*" by a Will made during Coverture. This consequently wanted Conveyance to interest if she died first & but if the Husband died first the Will was considered absolute.

operation, and there was no necessity of making a new Will. Now if the Will had been utterly void this could not have been the case. no subsequent Consent could renovate it.

But does some the Stat^o of Wills if a married woman make a Will during Coverture of her own Lands, such Will is not good, and it was held by the Op^t that the disability was created by the Stat^o of Henry 8th and was void in its Creation; for if the disability was not placed on this ground there are two provisions diametrically opposed to each other. But if it was placed on the Stat^o these provisions are reconciled, therefore it was owing to the disability created by Stat^o that the Will was void. 10 Mod^o, 123,

There is an old Saxon Custom likewise that a Tenant Covert may devise her Lands to her Husband.

In Brookes Praised it is held Brookes 2^d 18 that a Tenant Covert can devise her Lands, where by her Husband's Lands are devinable by Custom, it was only Lord Edward 3^d held that she could not devise to her Husband, because his Executors would be presumed.

In those States then where there is no Stat^o forbidding Tenants Covert to devise her Lands to their Husbands &c. The reason of the paucity of Cases in the English Books has been shown.

No argument has been urged from the Stat^o of 34th of Henry 8th that the ancient Stat^o of England made before the migration of our ancestors are binding upon us, and that therefore the Stat^o of Henry 8th is binding upon us. But tho' it be true that generally the English Stat^o serve as a good guide to direct us to the Com. Law, this exception must always be presumed, that where our Stat^o are in opposition to the English, either directly or by implication, these old Saxon Stat^o ~~are~~ ^{shall} be down.

Now every State has such a Stat^o as the 34th of Henry 8th but it differs from the English and does not expressly disqualify the Wife. The Stat^o of the Com^o is a direct copy of that of Henry 8th except along the clause disabling a feme covert to devise.

I apprehend then the conclusion fairly follows, that in these States, where she is not expressly disabled the Wife may devise. It must be supposed to have been their intention to give them the power, and it is remarkable that many of these Stat^o upon Wives are almost literal copies of that of Henry 8th except as to feme covert. Why then were they left out when it would have been so easy to insert them? evidently with the intention of leaving them to the operation of the Com. Law. to P

In the case in "Ambley" the Husband.
Covenanted to let the Wife & heirs her estate in
Real Property yet the Wife was held not to be
good. Because It was said the assent of the Hus- Ambley 627.
band could not remove a disability created
by Statute. The same Court has ~~been~~ observed
that the Husband's assent would enable her to
reclaim her Personal Property. This proves that
she was not disabled by ^{Conjugal} Law & the Husband's
assent would not remove the disability. —

Does marriage revoke the Will of a feme sole?

It is said in the Books that marriage re-
vokes a Will made by the Wife before marriage.
The Conjugal Partnership is intended. But it is true
in most cases, that the marriage affects
such a change in her property that as to that it
may be called a revocation. But if the Wife
be under the Personal Property and then married,
the Will would be obligatory, as there is nothing
on which the Will can operate the property
on the marriage passed from her to her Husband.

But if there were any thing say Judge Keene
on which the Deceased could stand I see nothing
to revoke the Will because the Wife was
"sui juris" when she made it. If she ever
she marry and have Children this is a revocation
of it because it is considered a tacit ^{Conjugal} Consent
annexed.

annexed to the Will that it should be void on
such a contingency

page 174

But if I should make a Will of Real
property, and then marries and survives her Hus-
band, such a Devise I should consider not good
it would be unreasonable to cause that Will to
operate. (as she can make word during Cove-
tured) - so as to disinherit her own Children
and she ought to have the Liberty of revoking the
Devise when the motives for its particular dis-
position are removed, as they often would be in
the course of time. - Generally then it is good
policy to make the marriage revoke the Will.

But in some Cases I apprehend the Will is
good, and ought to be so both upon Principle
and Policy. It ought to operate as a revocation
only in those Cases where the property would be
given by the Will to those persons who are
not the nearest to her in rank of affection.

If a woman be "Sui juris" at the time of mak-
ing a Will. I cannot see any reason why
marriage alone should amount to a re-
vocation.

Of the separate property of the Wife

It is now well understood that she may
have such property both in Real and Personal
Estate. It may be given to her by her Husband

as paid money or furniture, or by any other person,
for her use either before or after Coverture, and the
Husband has no interest in it. Formerly these Con- 14 May 5/80
veyances were always to Trustees for the sole and sep- 3rd 11th 89th 5.
arate use, and the Wife might convey away or 147th 187.
dispose of this property, as she chose herself. It
was provided in that Instrument that the Trustees
must join her.

Of late years it is common to give 2nd 18th 137
the Estate immediately to the Wife without the 2nd 310.
intervention of Trustees. Such conveyances were entered
sinec upon to get such conveyances overruled.
and it is now corrected.

The Common Word used, and "to her sole
and separate use" - but these are not much
saying, any word which manifest an intention
to give it to her sole and separate use will be
sufficient.

In a case in "Brown", a Legacy was
given to her, so that her a great should discharge
the Executors. This was held to amount to an intention
to give it to her sole and separate use. Whether,
the Executors, in such Legacies will be regarded
as injured by it is doubtful as it is.

18th 123.

When property is given to the Wife without
the intervention of Trustees, it is settled that the
Creditors of the Husband cannot take it, and
if the Husband was the Donor, Hadwicks thought 18th 310
they might take it unless Trustees were appointed

When such Legacy is stated for her & her
 3 Atk 399 said may join the bar her & her. this was
 Dunlop, 187. decided in the case in "Dunlop" and in 3.
 D. 1805 of Atkin's 399. and in the above case a gift
 2005 or 299 from the Husband immediately to his Wife
 was good. as yet find the, not yet. And then.

The Father of the Husband on the wedding
 2 Atk 559 night made his Wife a present of a diamond
 3 Atk 334. The question was whether this was part of
 her Paraphernalia or her separate prop-
 erty? The Ct. decided that it was her own sep-
 arate property.

Articles of agreement respect-
 ing such property have been held to be good.
 The idea I wish to enforce is this that the
 particular words are necessary to convey to
 her separate use. any, Causation cannot fall-
 ing the gift by which such an intention
 can be collected and so forth. If this
 3 Atk 144. Separate property can be reached by County
 1805 or 10 it will be made liable for her Contingent
 made during Coverture. but her person
 cannot be taken, as her Husband's right cannot
 be enforced upon, except when the mar-
 riage takes place during the pendency of the
 suit. With respect to the separate
 property she is treated as a feme sole, so far
 as is consistent with the Husband's rights.

When the Wife advances her separate property to relieve her Husband from encumbrances or Mortgages if she takes a receipt from him she will stand as a lien with 200. the place of the Mortgage. but if she does not take a receipt it will be looked upon as a Gift from her to her Husband -- or if it appears from evidence that the Husband recognized it as a loan from her she will be a creditor of his Estate. page 17
with 200.
B.R. 82

It is no uncommon thing for a Wife to appear in Chy. and Comand the Trustees to assign her separate property to her Husband but if there is any ground for presuming Coverture the Ct will not interfere.

In "Pur Williams" 82, it was agreed before marriage, that she should assign Mortgages due to her to Trustees for her sole and separate use. - They were assigned and they remained. He died the interest for 10. years, and died without any enquiry made by her respecting them. - It was held that she was not entitled to recover from his Executors the interest so received. B.R. 82
D. - 341

In one case the Wife put out her separate property in the name of her Husband, and her Ex^{or} claimed it and it was denied.

decided that this must be construed as a gift
But this I can't subscribe to. for she might
have intended to make her Husband a Trustee
to enable him to sue as a Ch. of Law.

If the Wife have separate Real & prop-
erty she may dispose of it as she pleases.

But suppose it be given to Trustees for
her use Can she convey the legal title?
For form it seems she could not, but this is
found only, for she can compel the Trustees
to do it. So that there is no doubt she can
her personal property.

When the Wife sues in Ch. for separate
property she may sue in the name of her
Husband. & if of the refusal she may sue
by her "prochein amey" who is looked for Courts.
What she may not raise a false claimant!

Ch. Bill decree the money so received
shall be paid over to the Wife. When the Wife
is sued alone, judgment goes against her, but Ex.
can issue only against her separate property.

cf. Ch. 35

If the Husband gets her separate prop-
erty into his possession she may sue him
in Ch. by her "prochein amey."

Of marriage Contracts by Minors.

Minors (males), are allowed to contract
in marriage at 14 and females at 12 days of age

207

Marriage Settlements or Contracts made by
minors at this age are often *Lotum* good in *Eq.*, 3 *Mss.* 607,
but they are not necessarily so. But the *Eq.* 2 *Levins* 146
will look at it to see whether they are proper. 2 *PR* 443,
and *provident*

If such a Settlement be made
and a marriage be had without Consent of
Parents it is still good in Equity if the page 245
Settlement be a reasonable one though the
Magistrate or person marrying them be liable
to a penalty. When such Consent is to be had. —

The Wife had an Estate in Choses, and re-
ceived a Settlement from the Husband but
greatly inadequate to her Choses, and the
Husband dying, she claimed that the Wife was
entitled to her Choses again. — Generally we
know a Settlement to purchase Choses, but as
they were minors the Court gave her her Choses.
Idem. — yet had they been adults this Con-
tract would have been binding.

Contracts entered into before marriage
that the Wife shall have to her sole and
separate use whatever property may come
to her during Coverture, are binding to the
Husband and his Equities.

P

Of marriage Settlements.

A Settlement is as much as voluntary Conveyance as any thing else and generally such Conveyances are fraudulent ag^t Creditors, but Marriage Settlements differ from others in that they are not liable to the Claims of Creditors as it is considered as given for a valuable Consideration.

But the Settlement must be a reasonable one and adapted to his Circumstances. He can't convey away his whole Property to her under the Pretence of a marriage Settlement. Let us suppose it to be reasonable.

Went 103

Ex. Ch. 1034

There is another idea to be understood on this Subject viz. If he be upon himself and Wife. remainder to her Issues it is good. But if settled on the Husband and Wife. and remainder to his Brothers or any other Person. it is good as to them but good as to the Wife. when it comes to the Brothers &c. it will not avail against Creditors. Therefore marriage Settlements must provide for the marriage parties and their Issues and not for Collaterals.

Settlements made after marriage if made when the parties are both alive and before marriage will be good. But they must be made at the instant of the marriage. So if the Husband after marriage gives a portion to his Wife and.

and in Consideration thereof make a reasonable settlement it will be good as agt Creditors

So if she have property in the hands of Trust - Co Jan 188
less & ask to her Separate use, the Court have in Dec - 181
remade for such property unless he make a reasonable settlement rather than for. Feb 188
D^o 142D

Marriage Settlements made after marriage unattended with the foregoing Circumstances are void agt all Creditors for their Debts. 114
they are merely voluntary conveyances and the Wife herself is not bound by them in any respects
nor is the Husband for he may dispose of them as he pleases. 148
again for a valuable Consideration

Settlements made on the Wife on articles of Separation for her maintenance.

Articles of Separation or Separated maintenance don't stand upon the same footing as Marriage Settlements. It is settled in England that such Settlements are binding on the parties and the same will probably obtain in the U.S. & tho. there has been a division of sentiment on this subject and some American gentlemen have said that such Separated maintenance will not be recognized in this Country as inconsistent with the simplicity of our manners - I think that they will be at last.

some time and she sooner the better, ~~and~~
 The Court ^DCauses of Errors have recognized
 separate maintenance.

We are told the effect of such settle-
 ment in England is to discharge the Husband
 from all liability for the Wife's Contracts & w-
 aring Contract. But I doubt as the necessity
 of a separate allowance. There are no Cases
 which say that a separate maintenance is
 sufficient to free him from responsibility.
 The separation is in itself a provision for
 the Wife's maintenance, and I think that an
 order of separation alone would free him from
 paying her Debts. - unless the debts given to the
 Wife must be voluntary, and not from necessity.
 So if the Wife having spent her separate
 maintenance becomes a pauper, the
 Husband is not discharged but is liable to the
 Poor. for it is agreed on all hands that he is
 discharged only as to those persons who volun-
 tarily trust her. He is not therefore on the
 ground of separate maintenance, that he
 is discharged, but because others have chosen to
 trust her, and it appears to me that if they
 chose to trust her, (and without a separate
 maintenance) on her own credit knowing her
 circumstances, that the Husband ought to be dis-
 charged, because a man is not obliged unless he.

unless he has been faultily to maintain her
away from home.

In this case as the Husband
allows her to live away from him. She is justi-
fied in so doing. But he does not thereby re-
nounce and divest his rights (as is contended). -
not even that once he divorces her, his rights may
exist in him, even when they are living separately.

He is bound to relinquish nothing which he
has not agreed to by the articles which he signed
and of course that he has not resigned remains
and then,

There is a difference between settle-
ments for separate maintenance, and mar-
ried settlements, in that the first are liable
to the demands of Creditors if they can't get paid
otherwise. But the last are not.

If the Wife elopes, he is not obliged to main-
tain her, and I think says Judge Reeves he is. ^{see Contro 127-8}
no more obliged to support her when she lives ^{in under articles}
away from him by mutual agreement ^{see page 121, 114.} and
without a separate maintenance.

Again, when a woman comes into pos-
session of a married settlement she may dis-
pose of or alienate it. - But she can't alienate
lands or real property settled upon her for her
separate maintenance for it is not in her

as Dower as the man take her Dower. But she
 is only entitled to the usufruct in order to
 maintain her. But she may dispose of such
 personal property as is settled upon her for
 her maintenance

2d. If the Husband much promises the Wife
 during Coverture do so &c &c do - Such promise
 2d. 148 if executory is not binding. But if executed
 4 Co. Rep. 60 is good. - So when the Husband induces her
 + 2d. 143 to settle her Land under a promise to leave her
 not Equ. in something in Will. but dies without making
 any Will. But only gave a Bond to another
 Cou. as he Day. 221. for her use that promise was deemed to be
 gone agt. his Ex.

In Coke's Reports 17th it
 was holden that marriage was a Countermand
 of a Will of the said property made by the Wife.
 4 Co. Rep. 60. It is true that a Woman should not be bound
 by a Will, which she could not alter. as the
 page 164 the Stat^o of Henry 8th forbade her. but where
 she can make or alter a Will during Cov-
 erture this could not operate.

Women when about to marry have fre-
 quently made settlements of their property
 2d. 17 to their now separated use. in every case
 they have been holden fraudulent agt. the
 Husband if done without his knowledge. -
 A.

Attornments lawed by a Widow for the
use of her Children by a former Husband, is
good, and will bind the second Husband, -

It has often been practised in England
for the Husband to take a Mortgage to him-
self and Wife. In all Countries where the "jus
auctoritatis" prevails, the Mortgage will in this
case survive to the Wife. - And I am of the
opinion that she would have it even in those
States where the "jus auctoritatis" - is exploded.
The law is difficult to unite. - It is understood
this would be void ag^t Creditors but I look
upon it as voluntary Conveyance to her, and
she can hold it ag^t her C^{rs} as any other
volunteer. If the money had been paid some
eventure she would have had no right to any
part of it - but I consider the above to be the
true point of light, as I cannot see another mo-
tion for the Husband joining her. -

The Wife mortgaging her Land
to aid her Husband.

This is a common
thing. In England it must be done by Fine
in this Country any ordinary mode of Convey-
ance will do. A Question has arisen
whether a Covenant by the Wife to Convey by
Fine is binding upon her? - Judge Reeves
thinks -

thinks the authorities warrant us to suppose
 1 Rolle 378 that it will bind her - but it is a disputed
 1 Eq. Op. 176 point, and the authorities favour both sides
 1 Conn. 81 of the question - it depends on the old question
 of marital rights. If she is bound by a
 conveyance she ought to be bound by a Con-
 tract to convey. P

When the Wife has mortgaged her Es-
 tate to help her Husband, and the Money is
 not paid up, it is a question whether if
 the Husband borrows more Money upon
 the credit of the Land, the Estate is bound by
 1 Vernon 41 this last sum? And this is a new question.
 I should think that the Land ought not to
 be security for such sums, without the Con-
 sent of the Wife. But the Authorities have
 decided that it is, and hold that the Equity
 of the Mortgage is equal to that of the Wife.

After the death of the Husband, his
 120 Mass 377 personal Estate must discharge the
 1 Conn 237 Wife's mortgaged Estate, but subject to this
 restriction that if the personal Estate is
 wanted for other Creditors she must be paid
 from. But this right in the Wife to be con-
 sidered a Creditors may be rebutted by showing
 3 Bos. & P. 211 in fact evidenced that she did not consider
 herself so. That she intended to make it a -

as respects to her Husband be. - - - - - page 167

But remember that the operation of this ^{18th} 304
evidence is merely to rebut an Equity. bore - 18th 189.
into an equitable inference and not to con-
vict or overthrow by parol evidence a written
instrument (which cannot be done).

If the Wife mortgages her Estate to free
her Husband's Estate from a Mortgage she ^{page 167}
stands in the same place with the orig- ^{21th 384}
inal Mortgage, and shall hold the Estate
encumbered until she shall be indem-
nified

If the Wife is a Mortgagee it is look-
ed upon as Personal Property exactly like
the money advanced by her when the Mort-
gage was made. At marriage Settlements
will purchase this among her other Chances. ^{28th 401}
^{29th 412}

But if the Husband Conveys away the
Land without having received the Money to
be paid, the alienation will not hold.

Of the Wife's Settlement

A person may have a right to a Settle-
ment in many places but can have more
than one at a time. By Marriage the
Wife obtains a Settlement in the place
where her Husband lives, but if her Hus-
band -

Husband has no Settlement. She gains none
and of course does not cohabit with him.

When a person has no Settlement, the
Law in which he lives must furnish him
with necessaries, but they become Creditors to
the State to that amount. — The Wife
page 346, can't be sent to her own Settlement. During
Coverture, even if they become Paupers & the
Wife can't be separated from her Husband
But if he runs away and leaves her.
Justice 374 Joseph Reed thinks she may be removed to her
D^r 379 maiden Settlement, but the authorities are
contradictory.

A marriage before the 20th of
Geo. 2^d was legal, let it have been celebrated
in any way, but since that Statute, unless
the married couple comply with the prescribed
form it is void to all intents and purposes
and consequently gives the Wife no Settlement.
But it is held that cohabitation is
evidence of the legality of the marriage.

Of their being Witnesses for each other,
The Evidence is that they can't be Witnesses
Co Lito, 6th either for or against each other. They are
different in this respect from all other rela-
tions — as Parents & Child may be Witnesses &c

But the wife can in any case be a witness, either for or ag^t her Husband. So that it can be on the ground of interest for in other cases interested persons may be W^{ts}. ^{Quid 252} unless if the antagonists are willing to waive^d - 571, such objections. But such would not admit a Wifes testimony - The true ground is to preserve domestic tranquility which such testimony would have a tendency to interrupt. D

However there are exceptions to this rule. by one of which, it is said by the clementine Constit. a Wife may be W^{ts}. ⁸⁷² in a charge of Reason. But I have found no such decision in the Books. -

Where one party is Compelled by the other which he or she is afraid of, for his or her Life such party may be a Witness on the Complaint.

Another exception which is in some ⁸⁷³ agreed & disputed is that when the Husband ^{Exclusively,} is presumed by the public for a ^{Case} abuse of his Wife, she may be a Witness, ag^t him. But subsequent judges have condemned the principle.

But the decision in Styias Case in "Stanger" has confirmed the rule.

Since that Case. Judge Reed says he does not know what the Punishment has been condemned. He was opposite to us as a dangerous expedient but the answer was that it must be admitted from the necessity of the Case from want of other Testimony -

The right of Husband and Wife to commit a Battery in defence of, each other.

The rule is that either party may defend the other, what she or he may do for him or herself - & the Husband may help his Wife when she has a right by Law to help herself -

That the Husband may kill a man attempting to violate the Chastity of his Wife. But he is not justified in killing a man whom he finds in adultery with his Wife since she herself has a right to do it.

Of duly Celebrating Marriage.

In all well regulated Communities, some forms are made necessary to give efficacy to this Contract. The marriage must be celebrated in a manner notori-ous. I don't mean that it is necessary to its validity that the Celebration be show-
ing

according to the forms prescribed by Law
this is the great question about which so
much difference of opinion has been enter-
tained.

Previous to the Reformation
by Henry 8.th Marriage was considered an ec-
clesiastical Contract, and was celebrated
only by the Clergy. At the Reformation
the doctrine of it being a Sacrament was
rejected by the Protestants who considered it a
mere Civil Ceremony. The Clergy however
were considered proper persons to perform the
rites tho. in a Civil Capacity.

At the revolution they were taken
from the Clergy and given to justices of the
Peace. But at the restoration of Chas. 2.^d
they were again given to the Clergy.

And now by 20th of George 2.^d all
marriages not performed according to the
forms prescribed by the Stat. are absolutely
void. Before this Stat. then only Law
is sufficient to find evidence of the B. & W.

We have no such Stat. in Conn^o as the
20th of Geo. 2.^d - We have a Stat. which
provides that justices of the Peace may marry

I suppose then here a person celebrated
in marriage who is not qualified by Stat.
is it void, and the issue Bastard? -

One thing.

One thing is clear. that the person who
performs the rite without being authorized
is liable to punishment. But the
question is whether the Marriage itself is
void? In England it is void. But I
think that where they are celebrated by a
priest not forbidden by Stat. they are good.
I think such irregular Conduct is not the
ground of avoiding the marriage.

Several Cases in England before
the Court of King's Bench will give us some light
on the Subject.

Thus of a Clergyman in
one Country Celebrates a marriage between
two persons who live in a different Country
the marriage would be good. &c.

And in England a marriage by a
Layman in the presence of the Congregation
was good. for the children were admitted to
the Sacrament, and the Husband was entitled to sue
for her fornication &c. and thus while the right
of marrying was ^{restored} conferred to the Clergy.

During the usurpation of Cromwell -
a Clergyman married when none but Jus-
tices of the Peace were qualified and yet
the marriage was held good.

So where a Popish Priest married
a couple and one of them married again

the second marriage was dissolved and he was convicted for Bigamy.

These Cases and many others which took place before the Stat. of Geo. 2^d above mentioned afford irrefragable proof, that such marriages were not void at C.L.

There is only one Case opposing it, and that was decided by the Ecclesiastical Court, 2 Salk. 437.

An Debt upon a Bond given to the Wife ^{Conds. 473.} before marriage &c. it appeared that there was a marriage but not according to Law, the Ch. held the marriage legal tho' not celebrated by persons qualified &c. and the House was divided &c.

There is nothing probably in the American Stat. like that of Geo. 2^d in avoiding marriages. The effect of Statute is necessary by the marriage act yet more certainly that the marriage is void without such Consent, or without publication and yet they ought to be void according to the opposite doctrine.

That is necessary to constitute a void marriage. Says Judge Black is the effect of the parties duly evidenced in various Contracts. ^{Stake 27, 43, 340, Co. Litt 33,}

The age of Consent as Law before stated is 12 in Females & 14 in males.

They

They may have been many at any age but
 page 215 it is voidable in either party until the age
 of Consent in both is 21 and must be bound
 or neither.

There is one thing more that
 has strangely involved a diversity of opin-
 ion, & whether a marriage obtained
 18 June 1838 by a wife, of the Woman, is void or not?
 Some have held it good others void.

It is astonishing says Judge Reese that
 this most important Contract should not
 be voided by a wife. When every other Spe-
 cies of Contract is - I think it ought to be void.

So it is said and I do not know by marriage
 to this I cannot assent.

Of Divorces & unlawful Marriages.

The Stat 32^d of Henry 8th declares
 that all Marriages within the Levitical de-
 grees, or "Contrary to Gods Law," void.
 Code 134 a note 3

The question is what are the Levitical de-
 grees. - This rule is unused. What when-
 ever by the Computation of the Civil Law,
 a person is within the third degree it is
 unlawful to marry - Thus a man can
 marry his Niece. But he may marry his
 Nieces Daughter. First Cousins may mar-
 ry according to this mode of Computation.

Courts of Justice have said that by "God's Law" was meant this - that the Law forbids taking a second Wife the first living - That where there was a prior Contract but this idea is exploded. - That in Case of inability the Law operates.

These marriages now except the second are now void, in all such Cases a Divorce may be obtained, tho. it is not necessary in Case of a second marriage.

The Spiritual degree includes affinity as well as consanguinity. But blood relations of the Husband are not blood relations of the Wife and therefore such marriages are void.

In any of these Cases a Divorce à vinculo matrimonii would be procured from the Ecclesiastical C^o. This Divorce is for some preexisting Cause.

But Divorces à vinculo matrimonii are for Supervening Causes - such as Adultery threatening to kill the wife.

In the former Case the Children are bastardized after Divorce but never before nor can they be after the Parents death.

In Common Law Divorces à vinculo matrimonii are awarded for Supervening Causes of course the issue are not bastardized for the

10th Dig 307

Relic 300

3 Co 98

Barthol 279

Co. Litt 335

12th 121

Co. Litt 462

Morr 105

marriage itself was legal

Whether a Divorce "*a vinculo matrimonii*" is given for Superior Causes, the Legislature only can grant it. But

In Divorce "*a mensa et thoro*," she cannot have a right to grant the Wife Alimony for her maintenance.

The consequence of a Divorce "*a mensa et thoro*" is that it only deprives the Husband of a right to her person. But no other material right is defeated.

When the Wife is divorced in Conn^D "*a vinculo matrimonii*," for her own adultery, she is not entitled to her Dower. Otherwise if the adultery or Cause of Divorce be at the fault of the Husband.

Here too a man is authorized to marry within the Levitical degree in one Case. And that is the sister of his deceased Wife.

page 270. It has been decided that a man may not marry his illegitimate Sister, but that is contrary to Conn Law, as by it she is "*filia naturalis*."

Parent and Child
Guardian & Ward

John - 1800
William - 1800

Parent and Child

Comprehending the relation

of
Guardian and Ward.
by J. Gould Esq. 1812.

An Infant or Minor by the Com. Law of England is any person male or female under 21st 118
over the age of 21st 118. The period of full age Dittson 104
is not the same in all Countries by the Com. Law 289
Law 289 is full age which is so for most 103
purposes in the present French Empire. as
it was in ancient Rome.

I shall first treat of the

Privileges and Disabilities of Infants.

1st as to their Crimes. 2nd as to their Contracts.
and 3rd as to their Contracts.

By the Com. Law of England and our
own an Infant under the age of 7 years
cannot commit an offence or Crime. He may 280
indeed do the act prohibited but he is not guilty 283
of the Crime attached to such act without 454.
he be more than 7 yrs old. He is deemed to want 1
a Capacity to discriminate between right and 274.
wrong. At 14 a person is punished in
Engl. as much as an Adult. Between the age
of 7 and 14 the Infants liability depends on the

his "dolo Capax" if he is not "dolo Capax," he is not punishable for any offence for in judge of Law he is incapable of committing any offence. Consequently he is punishable both-
wise as he is liable to discriminate between right and wrong.

It is said in some of the Books that between 7 and 10th the presumption is based 70-2 that he is not "dolo Capax," and therefore 18 Cal 30 lies upon the person prosecuting to prove 2^d 25-6-7 that he is "dolo Capax." - From 10th to 14 the 2^d 454 presumption is ag^t him and he must then 18 Cal 404 prove that he was not "dolo Capax," but 18 Cal 42^d 23-3, thinks it clear that the presumption of Law is in favour of the Infant until 14. Because if the presumption be ag^t him from 10th the rule is negative that says till 14 his liability is "prima facie" "dolo Capax."

It is said in some of the Books that Infants are "indulged" after 14 for some misdemeanors they don't tell us what is the 3 Cal 130 class of Cases. But Mr Gould presumes the excep-
1st Cal 30, 22nd tion is confined to Cases of omission, from the 4th Cal 30, 22nd examples adduced which are all confined to 176 D. - 7 Cases of mere omission for which the reason I suppose gen^{ly} to be that the Infant has not the command of his property and person and is supposed not to have the means of preserv-
ing

performing the acts.

With regard to an Infant under the age of 7 years being Capable of Com-
mitting a Crime the presumption of Law in
his favor can be rebutted. Its "Presumption
is not a presumption of Law. Com-
mitting in itself an inflexible rule of Law.

Readers 19
Foster 439
Cox 222
4th Ed 337
1st Ed 464
1st Ed 303

An Infant under the age of 7 years
cannot be punished. Between the age of 7 and
14 as above stated. Proof must be given that
he was "sane Capax" - The Law I wanted to
make that in consequence of this incapacity
which the Law always supposes an Infant
to be under; its a rule of practice never
to punish an Infant to be convicted on his
own Confession without great Caution.

Mr Justice Foster in a case of this kind
directed the Jury to enter a Verdict of "Not Guilty".
where the Infant persisted in a plea of Guilty
on a Charge of Felony and this would probably
be the Case whenever the Infant makes a
plea of Guilty on a Charge of Felony. (in *My*
document that might be permitted to plead Guilty & B.D.
but not in Crimes the rules thus far pro-
posed are from the Com. Law.

With regard to some Statutes there is a
distinction which the Books reveal & because
it is difficult to lay down a definite rule.

General

General Power of Stat^s inflicting Corporal Punishment
 is sometimes extended to Infants though
 they be not expressly included in the terms
 of the Stat^s - as other Cases they do not extend
 to Infants unless they are named. I had
 given myself no little trouble to give a Cor-
 rect rule of discrimination in General Stat^s
 and Stat^s inflicting Corporal Punishment, in
 Hooker's note to B. C. 11. If the offence created
 by Stat^s is made such an offence as is Corporal
 ly punished at Com. Law Infants are included in
 the Stat^s though not named. E. G. If a Stat^s pro-
 vides that whoever should obstruct a Highway
 1 Stat. 247 should be guilty of Felony and punishable with
 D^e - 357 death and Infant is as liable as any other person
 2 How. 354. and punish it is such an offence as is punishable
 1 Cr. 26 374 at Com. Law. But if a Stat^s prohibits and
 1 Hale 212 acts, inflicts Corporal Punishment but does
 not constitute it such an offence as is Corporal
 ly punished at Com. Law the Infant is not
 punishable unless named. E. G. it has always
 been held that the Infant is not concerned
 within the Stat^s of forcible entry and detainer
 - the Stat^s does not name them and they are not
 punishable at Com. Law. The Stat^s has some
 cases attaches to Com. Law offences to a new Spe-
 cies of acts, in others it constitutes such acts and
 offences in itself. The Books mention the Infants

is not liable when the Corporate Punishment is
 Collocated to the Offence: this is almost un-
 intelligible. (by Collocated to the Offence is meant
 a Punishment not incident by the Court to the
 Offence prohibited.)

"Mr. Justice says he believes
 this distinction to be that true one: but the
 question arises why is this distinction made?
 I suppose says Mr. Justice it results from the
 benignity which bill of Laws usually carries
 in Constituting Stat. in regard to Infants. —

But when an offence at Court Law is
 made a higher Corporate one by Stat. i.e. of
 a different punishment. It is such a move
 and as not to include Infants the Infant is
 still punishable as at Court Law & I suppose
 i.e. Whipping, Pillory &c. the Infant
 would not be punishable but by Court Law,
 and if he be 14 he would be punishable by C.L.

Of the Infants. Stat. in that case & place

I would here premise that there has
 been a Genl error in the belief of the Parli-
 tion, that Infants were not punishable for
 Torts until 14 as in Crimes. "Civilized
 Infant is liable for Torts when committed at
 any age by Torts I mean in Genl
 manner."

manner of actions arising "ex delicto," but
 particularly private injuries committed with
 force, - the is thus called Civilis but not
 criminalized at any age. An Infant would be
 liable for trover, because this is founded in
 Concession which always supposes a person
misfeasance, the reason why an Infant
 is liable in this Case is that whenever
 wrongs are committed by force the intention of
 the wrongdoer is never regarded to make him
 responsible to the party injured. Law in re-
 gard to all Civil actions does not regard the
 intent at all, it is sufficient to entitle a
 person to recover who has been injured that
 he was the party wronged, no matter whether done
 with malice or not. Thus there is an an-
 cient Case where a Waller was maintained
 agt. a 4-year old Infant for scratching out
 a mans eye & more or the other hand
 suffice. The Law requires that the author or the
 wrongdoer should in preference to the injured
 party.

In Criminal actions the intention
 is always necessary to constitute the Crime.
 The maxim in the Criminal Code is "Nemo
 sibi reus nisi mens sit reus." - because mens
 is meant here is meant to constitute the Crime
 but in Civil Cases damages are recovered.

not

not for example they are not a punishment
but a mere indemnity. And when a civil
injury is committed, with force the question
is simply "who done this injury?"

The Infant here was not liable at
any age for any torts, he has been held li-
able at 14 for slander, and it was said, Nov 129
not before but the only authority is in 3 B. & C. 32
129, and I don't think this an authority. But
as it was thus determined that an offence
was 14 years old an action would lie it is
frequently inferred by many that an action
in slander would not lie before 14. But this
is certainly a "non sequitur" and is not sup-
ported by the case. The question has been asked is
an Infant of 4 yrs old liable? Certainly not says
Mr. Justice. The Infant can't be liable in slander till
he is "soli Capax", because this is not an injury
committed by force - it requires malice to portend
into the offence & slander for defamatory
words without a malicious intention are not slander
if with a malicious intent spoken at 14 an In-
fant is liable. It is somewhat remarkable
that in our System of Civil Law which has been
practised for ages there is no time fixed when
a person is liable; 14 is the presumed age of
discretion, as he is then of matured age, at what
age is an action on the case he is liable, as
being capable of malice.

1 Geo. 4th 129
 D^o - 2587 that an Infant is liable to be punished as if
 1 Geo. 4th 109 Courthouse Cheat tho. it is said he is not liable
 16 Geo. 4th 778 in a civil action for fraud, or deceit.

D^o - 914 Both branches of this position. I think require
 18 Geo. 4th 71 qualification. If 6 months or 6 years old he is
 page + 217. presumed not to be punishable he is only liable

to be so punished if "dolus Capax". As to the other
 hand it is said no Infant is liable "civiliter"
 for a fraud or Cheat: this I confess seems to
 me directly opposed to the Com. Law principle
 for why should he not be liable in an action
 of fraud? he certainly should be liable "civiliter"
 when "dolus Capax". See Mansfield and Monro in
 3 Burr 1802 the Case of "Kneeb and Parsons" 3 Burr 1802 Inf
 228. port. this idea as the former held the privilege
 of an Infant should be a shield and not a sword,
 these two great maxims opposed to the decision
 must at least render the proposition questionable
 which in my own opinion is certainly not Law.
 See 2 Diction. in 3 Day. Stirling vs. Adams, in error,

But tho. an Infant at any age is liable
 for his Torts committed by force and I think
 also for fraud when "dolus Capax" yet he is
 8 Geo. 4th 558 never liable for a Tort arising "by Contract."
 page 217. because if he could be rendered liable by va-
 rying the form of action his power would be
 be nearly unbounded - as when a person takes
 and

an Infant & Heard who injured him, on which
he was sued charging him with fraud it was ho-
wever he was not liable for a fraud "ex Contractu" s. p. r.
and that was only a breach of trust, & Ed & Hargrave
division.

It was once held in the time of Ed.
Halket not by himself but by Parker and Trevelyan
that if an Infant took upon himself to trade
as an adult he was liable and p. r. of it - 24 End 203,
fancy should not be admitted. This Trust is
not then considered as Ed. & Hargrave and Infants
whenever he pleads might amount the disabil-
ities which the Law has imposed upon him. -

The Courts may waive a rule p. r. of it
for himself but an Infant can't. In some cases
however Chy. will waive a Contract to be good
against Infants to prevent a fraud & p. r. of it
being affected by him: the question may be asked
what cases? I answered that I will know our
Class of Cases in which it will interfere, & p. r. of it
from the nature of equitable interference. It is
almost impossible to classify those Cases or lay
down any general rule. The Chancellor p. r. of it
a fraud in such Cases which is refused to in-
terfere in such occasions; the Ch. interferes in these
Cases by virtue of its authority as Guardian p. r. of it
amenable to all Statutes in the Kingdom. The Ch.
of Ed. Court is thus without question down every
principle of Law. -

Equity

3 Bac. 140, Equity Ct. can do what is equitable to the Infant
 West. 40-1 and can do to the Party Contracting what will
 9ellod. 389 not injure the Infants. Infants are therefore in
 28 Ep. 489 no danger in Ct of Equity. They have authority
 as Guardians of Infants and may in that way
 Contracts be for them do as not to affect their rights.
 as the influence of the Chancellor is altogether
 discretionary. Thus can be no Gen. rule given for
 a discrimination.

West 149
 38 270

But a Ct of Equity can enforce
 a Contract agt. an Infant which in the Com.
 Law is absolutely void; it is otherwise when merely
 voidable; the first is as tho it had never existed
 and therefore the Chancellor can't affirm what nev-
 er existed; a voidable one is good until avoided
 and so it stands. This is another reason applic-
 mied in case of one absolutely void. There could
 be no consideration. It is not tho it is because
 the Contract being void the stipulations of one
 party could be no consideration to support those
 of the other.

West. 71
 146 78

page 217

I shall now consider the powers and disabilities of Infants of a miscellaneous
and nature. To be treated of them as affecting their
 Contracts.

10 Bond 403
 11 Bond 41-2
 12 Bond 42
 13 Bond 43

In England the age for choosing Guardians
 and both for males and females is 14 years. An
 Infant may be an Executor at any age, or even one
 "in ventre sa mere" but he can't act as such until
 14.

he is 17. and during his minority under 17. under 5 Coke 29.
 minister. "dumtaxto ministeriale" must be ap. Holt 250.
 "dumtaxto ministeriale" must be ap. Holt 250.
 "dumtaxto ministeriale" must be ap. Holt 250.
 "dumtaxto ministeriale" must be ap. Holt 250.
 "dumtaxto ministeriale" must be ap. Holt 250.

But as one can be an Administrator until
 21 because he must give bond, which an Ex. 5 Coke 29
 in Eng^d in England is not obliged to do. - The Eng. Court 275.
 said an Ex. may act at 17. but it is doubtful whether he can in Conn^d at that age. because
 here Ex. as well as Administrators are bound
 to give bond, in my opinion he cannot.

The age of Consent to Marriage is by the 13 Hen 430
 English Law and our own 14 in males and 12 in females; but if either party be under this 13 Hen 403
 age and the other not, either may refuse to
 the Contract. Both are bound or neither. But it is
 seems in England a female may be betrothed
 at 7, and if she will be entitled to Dower. 3 D. 131

The better opinion is that the age for dis- 1 Inst. 89
 posing of Personal Property in England by Will 28 Hen 104
 is 14 in Males and 12 in Females. others say 15 D. 459
 and some 17: the first is undoubtedly the better
 opinion. because it conforms to the ecclesiastical
 rules which govern in such Cases, 2 Inst. 318
 1 Hen 403
 2 D. 497

By the Stat Law of Conn. the age for dis- 3d Conn 42
 posing of Personal Property by Will is 17 in
 both Sexes -

The full age is completed on the
 day

Salk 44 say preceding the 21st anniversary of his birth
 D^o 623^d And that is no fraction of a Day. Consequently
 11 Bon^o 453
 20 May 480 one may be off all age when past 21 by 11th
 D^o 1090, say that 48 hours.

Of the Infants Contracts. As a gen^l

Rule no person under the age of 21 yrs can bind
 Romo 453 himself by Contract. Such Contracts are either
 void or voidable.

D^o 500, If an Infant and an adult
 8th Mod^o 140 contract the adult is bound and the Infant is not
 18th Mod^o 58, If they join in giving a promise Bond the Adult is
 bound tho the Infant is not. It is the doctrine
 of the Courts.

The 70th article of Statute is person
 18th Mod^o 38, and will not extend to a Co-Contracting Party.
 1st Mod^o 28, and this rule holds as to a Contract of Aff^o V^o
 16th Mod^o 41, 440, made between an adult and an Infant tho for
 18th Mod^o 51, money is bound tho the latter is not. This rule is
 20th Mod^o 937, sufficient when either party is under the age of
 page 210th 21. (Because the contract is
 void absolutely void)

And the same rule holds in Equity: tho
 18th Mod^o 38, 440, the Infant may obtain a specified performance when
 1st Mod^o 28, the Adult could not have obtained and as to the
 Infant, they however do it in such a manner
 as not to deprive the Adult of the benefit of his
 part of the Contract. The Adult's bene^o
 bound when the Infant is not, is not inconsistent.

inconsistent with the rule that in Contracts both must be bound or neither. This only means that by the terms of the Contract both must be bound or neither, as if A be bound to B, but B is bound to A or not as he pleases, in this case neither is bound by such Contract. For there can be no Consideration for A's promise. But the rule that the Adult is bound when the Infant is not, does not hold in Contracts strictly void, because such an agreement is a legal nullity, and therefore the Infant's promise affords no Consideration for the Adult's promise.

When only voidable the Contract is good until avoided, and the rule of the Court is that if an Infant avoids a Contract with an Adult and recovers back what he has paid or transferred to the Adult yet he is not liable to refund what he himself has received. It is considered a gift. It is impossible Mr. Justice Conner to derogate this rule, without destroying the Privilege of Infancy; the rule has attracted much disapprobation, but it is well settled and unassailable. So far as the avoidance of a Contract was a fraud the exercise of his Privilege would in every case render him liable for fraud, and this would be the same as to render him liable on the Contract itself. For to suppose the rule of damages would be much the same, the Infant is allowed this privilege on a supposed indiscretion, and this principle

See Vol 2
page 340
" 255

See Vol 2
page 214

See Question
in North's Case
Vol 2 page 254

See 1444-5
1812-1819
Lewins 153
1446-905
Do 913
page 1312
G. & P.

if allowed would give fuel and sufficient scope to its exercise. There are indeed a number of cases where an owner against the Infants would do him no injury, and leave him in debt to give as when he purchases a Horse, receives back the Money, and still retains the Horse, detained might certainly lie without infringing the Infants' privilege. But the rule of Law must be general, and relief only should be allowed in Equity.

Infants however may bind themselves by Contract for necessaries. These the Law desires to be Good, Cloths, Lodging, Washing, Mending, and Instruction. This is allowed to prevent the Infants suffering from want of things so indispensable.

But to bring a case within this exception, the articles must be necessary for the Infant at the time of contracting, for this is a question to be determined by the Jury, but the Law settles what articles amount to necessaries; the Jury only determines whether those necessaries were such for the Infant, at the time, taking into consideration all the circumstances of the Infant's rank, fortune and situation. It is very proper for any Child in Town to be sent to a common School Education.

Coats 100-11

And as the Jury are to determine as to the fact of the articles being necessary for the Infants

It is sufficient for the Plff. to reply Genl^y that he furnished necessities to the Infant and he need not set them forth in the writ specifically as he would have done if the C^t were to determine them

An Infant is bound for necessities *Sec^c 168*
for himself so is he for those of his Wife and *Ch^c Dec^r 1781*
Children. An Infant is bound by all *3 B&P, 133, 4*
the Wife's Contracts before marriage but if the *Danvers v. 9th*
husband was bound for or married with a
Woman, the Husband takes her "Cure over" -

But the rule that an Infant may
bind himself for Necessaries must be taken *Ph. W. 224*
with a qualification; he can't bind himself *2 Mth, 3^d*
if he be under the care of a Parent, Guardian *2 B&P, 133, 5*
or Master, who sufficiently provides necessities
for him. The Parent &c is entrusted with much
discretion in determining what is necessary &c -

An Infant then can bind himself only
in three Cases - 1st Where he has no Parent
Guardian or Master. 2^d Where he has such *Recon, 445*
but they are out of the way to furnish him.
3^d Where such Parent, Guardian or Master
neglects to furnish him with sufficient necessities.

In the two latter Cases the Parent &c is
bound as well as the Infant & Conceiv^d. *page 294*
In third Cases the Parent &c is bound to maintain
& therefore should be taken on a contract for maintenance

We have a Statute in Conn^t that no Person
 under the Care of a Parent Master or Guardian
 can make a Contract to bind him self as
 shown by such Statute as mentioned in the
 Title of Master & Servant. This is also the rule
 of the Conn. Law. This however Mr. Gould sup-
 poses does not prevent such Infants from bind-
 ing himself for necessaries.

It is of Conn^t But the Stat^{ute} undoubtedly intended was a new
 Title Master & Servant. ruled unknown to the Conn. Law as to the Parents
 Master or Guardian himself going bound. The
 rule in Conn^t is that they are bound as to their
 authority the Infant to but not without such
 authority. Cited in several Manuscript Cases, As
 if a Parent permits his Child to become a trader,
 he will be bound by all the Contracts of the
 Infants.

I have already observed the Gen^l
 rule that where an Infants Contracts there is
 an exception as to the necessaries for which
 he may Contract. - In strictness the Infant is
 not himself bound in his Contract for Necessar-
 ies by the express Contract but only by one which
 the Law implies, he is not bound to pay the full
 value if more than the value but only what
 the necessaries were actually worth. Whereas if an
 Adult Contracts for double the sum which the Goods
 are worth he must pay

And thus -

And this remark brings me to consider, the
mode by which an Infant may bind himself
for necessaries. by some Contracts he is bound, by others
not. 1st An Infant can't bind himself by a
Pecuniary Bond, even for necessaries

as Eliz. 920
Rat. 729
Rat. Cont. 54
Bul. Dig. 154.

2nd By a Single Bill is no obligation with
out a penalty, he may bind himself for necessaries,
but not for other debts

as Eliz. 920
Rat. Cont. 54
Rat. 729
Bul. Dig. 154.

3rd By a Negotiable Note even given for
necessaries the Infant is not bound after the Note
is negotiated;

as Eliz. 920
Rat. Cont. 54
Rat. 729
Bul. Dig. 154.

4th By a Note not negotiable, or a
Negotiable Note not actually negotiated, if given
for necessaries he is bound. By a Note not nego-
tiable he is clearly bound and in the case of a
negotiable Note not actually negotiated it seems
he is.

Wood, 403nd.
Carthwa 150
Bul. Dig. 73
Rat. Cont. 34
Bul. Dig. 35

5th By a Bill of Exchange for necessaries
not negotiated, he is bound, if it is actually nego-
tiated he is not bound

Carthwa 150
Bul. Dig. 73
Rat. Cont. 34
Bul. Dig. 35

6th And lastly he is not bound by a w/c
stated, tho. the terms of the w/c may state it to
be for necessaries

3. Bac. 134
2. Atk. 169
3. Atk. 84
1. Atk. 40

These constitute all the material distinctions,
as to the mode by which an Infant can bind
himself for necessaries. I shall now give my con-
siderations and try to distinguish between them all.

He cannot by a Pecuniary Bond it is said
because the penalty is presumed to be to his
use

3. Bac. 134

1 Inst. 172^d, is a disadvantage, but this reason would not hold
 Co. Dec. 926. as to the other reason, as a Note of hand, negotiated by
 15 Inst. 73^d therefore it cannot be the fundamental governing
 principle: the true reason seems to be that
 the Consideration can be enquired into. The
 form of the Contract be such Genly, as will ad-
 mit of an enquiry into the Consideration the Infant
 is bound. Otherwise if an enquiry into the Consid-
 eration be excluded by the form of the Contract
 he is not bound tho the Contract was in fact
 made for his profit. A Penal Bond is a
Specialty, the true principle of discrimina-
 tion b/w the Cases is exactly the same.

Hobbs 382 2^d Infants may bind themselves by a single
 D 416, 423, Bled. as when the Consideration is not examined
 1 Levin 86 but this consideration would formerly have been
 Chate. Bled 20, enquired into, tho. it cannot at present Genly
 426 2 page 251. but in this Case I infer that an Infant may ex-
 amine the Consideration of a single Bled, and
 from one of the Cases cited in "Hobbs" it seems to
 be examinable: tho he would lose his privilege,
 either he can't bind himself by Bled or he may
 enquire into the Consideration. If we assume the
 latter is correct (see one Case in "Hobbs" is
 argued by counsel). This Case is an anomaly
 and it cannot be done by a Penal Bond,
 because an Infant never could bind himself
 by a Penal Bond. I repeat the rule

is altered, in case of a single Bond or Bill, - I, need scarcely explain what a single Bill is, it is in form exactly the same as the first part of a general Bond.

As to the 3rd and 4th Cases by a negotiable Note actually negotiated, an Infant is not bound. Quare after a Note is negotiated the Consideration can't be enquired into, our dispute, *Cap. 13* except as to its regularity and amount of sum & so as its *100 Cont 34* respects its existence. But if the Note is not *Do* ~ 35 negotiated he is bound (So if not negotiable), *Wood* 403 for then its admissibility of examination - *He is 100 Cont 44* bound by a negotiable Note until negotiated. *Clayton & Bury* but not when negotiated for then the Law *Do* 201 57827. admits no enquiry into it, these correspond with *Do* ~ 210 the leading principles laid down *Day* 614

A Bill of Exchange stands upon the same footing with a Negotiable Note, the principle is the same and the authorities seem to support *Sofia* both *Do* before its negotiation but not after its. Consideration may be enquired into.

Lastly an Infant is not bound by an acceptance for Accommodation, - the reason of the rule has ceased to exist. But still it is a rule of Law for when the rule was settled the itans were not examinable, then an Infant could not bind himself.

himself, but it is otherwise and for this may be examined. There is another reason assigned which to me appears a very unsatisfactory one, viz. that the Defant's only liability is the signing of the a/c, and he is supposed to be incapable of giving an account, this is a laboured attempt to support a rule of Law established by a reason which would probably never have occasioned such a rule. I suspect that the rule exists though the reason has failed. As to the last reason assigned by "Boswell" See 1st Parson on Contract 30

Date 189
 12th 12th 12th
 D. - 134
 Nov 87
 6th 18th 18th
 18th 18th 18th
 18th 18th 18th

In examining these various Cases of Cases it will be found I think that there is a perfect symmetry in the Law. Suppose an Infant actually Contract for Necessaries and execute a Personal Bond. He is certainly not bound upon the Personal Bond but is he bound in a Simple Contract which the Law would imply for these Necessaries? This depends upon the question whether the Personal Bond is voidable or absolutely void. If void, he is bound by the Simple Contract, but a Security strictly void is a legal non entity. If only voidable he is not liable on the Simple Contract because there the original Contract would be merged.

Whether a Personal Bond is merely voidable or strictly void. I shall consider in the next

Section -

With respect to Contracts good and voidable the difference is; the first is not to be in any way enforced. - For Money lent, and Infants is not bound at all. because it is not a necessity, unless actually laid out in the purchase of Necessaries. But Can Law the Infant is not liable to the lender unless the lender actually laid it out for Necessaries; the reason is that D^r 380. The Contract of lending must be good at the 10 Mos. 27. time, and Can't be undone so by any matter "ex 5. Mod. 208. part facts", now a loan for money Can never be Solved in 144. at a good Contract with an Infant. In Gen. a Money lent is not recoverable; but if the lender actually lays it out, he stands in the manner of Seller, to the Infant, and he may recover at Law, not as Money lent but as a Seller of Necessaries.

Money lent is not regarded as Necessaries, but in Equity and Infant is bound for Money lent. Provided he himself actually lays it out for necessities. he must at any rate pay the lender the real value of the Necessaries; this means sometimes Silver 144. not too so much as the Money lent, but it Can never be more than the Sum lent.

I will only remark that an Infant is not bound for Money lent to support his Grandmother, it was formerly considered to include such articles under the legal description of Necessaries. & C. a Married Woman Money to purchase Hides.

as a Blacksmith, to purchase from the Court for 494
 obliged to pay for their Hides so from are by no 1 Paid 30
 means necessary. The Infants right to be 1 Talk 279
 red is intended by Law for his actual necessities, 1 Rollo 729
 and for no other purpose whatever. What these 1 Sing 1083
 necessities are defined to be by Lord Hilly explained 1 Rollo 142
 yesterday.

Neither is an Infant bound by a
 Contract to pay for repairing Buildings because 1 Rollo 30
 this does not come under the legal description 3 Talk 190
 of Necessaries. It does not come under any of the 2 Rollo 271
 classes. 1 Rollo 139

But it has been held that if an
 Infant take a Lease of a House and reside in it
 the next day, and the rent is not above the value 1 Rollo 320
 of it, he is liable to pay in an action of 2 Rollo 199
 Debt. - I am unable to say upon what this 1 Rollo 30
 rule is founded. The Ct might say that he
 was obliged to pay for the same reason that he
 must pay for lodging, but this is incorrect
 for it was held that a Lease of Land would
 have the same effect.

This called rule as to rent of House & Land
 is so directly opposed to the ordinary rules that gov-
 ern this Field that I should think it a very ques-
 tionable one.

It was once determined that an In- 1 Rollo 440
 fant could not bind himself by a Contract for 1 Rollo 36
 & entered in Singing, and dancing. But I think
 it is

it might now come within the terms of mercenary Education and he would be bound, if such God - Calver was suited to his rank - Ed Mansfield has remarked in Cases of this sort, that the Law must change with times and manners.

The Gen^l rule is that an Infant is only bound by a Contract for necessities - But if he does voluntarily what he is bound to do by Law, or Equity he is bound by it as if he made a Contract for necessities. If however advantage be taken of him, the act would not bind him. Thus if an Infant is a joint-Tenant or Tenant in Common, and makes partition (in an equitable manner) he is as much bound by it as if he were of age for the Law would compel him to make partition. And I suppose A holds a lease as which D^r in 17th he is bound to pay rent, and dies and the Estate is transmitted to his Son an Infant and he pays rent, he can't recover the money back & would he is bound to pay it. So if an Infant dies at Law, what he gets the property of his Father or he is bound by it the same as an Adult. And I suppose in a Mortgaged Estate and the Mortgagor lends to his Infant Son, and he makes a recognizance upon receiving the money he shall be bound by it. - but in all these Cases the Conduct of the Stranger must be "bona fide" - He is bound at Law, tho he were only Compelled in Equity. -

page 331
a.
Codd^d 1726
D^r - 171
3rd Barr 1794
D^r - 1801
2nd Barr 1884
1st Inst. 138^a
D^r in 17th
18th Cent.
18th Cent.
3rd Cent.
page 331

This latter seems to be the only Class in which an Infant is bound at Law except for *D^o* - 429
Manservant - An Infant Defendant is bound by a decree in Equity against him except that he is allowed six months after attaining full age to impeach the Decree for error or fraud. (this time is taken in Law his day) he cannot set it aside but could he was an Infant. but only for fraud & error or matter of Error.

2 Vern^o 344
2 Vent^o 351
1 Vern^o 298
1 Vern^o 514
2 P^o - 441
3 P^o - 357
3 Atk^o - 352
(1)^o - 520

But an Infant Defendant is as much bound by a decree in Chy as an Adult unless he can show fraud or gross neglect in his next friend (called his Prochein Amie), he cannot at full age set it aside because the other party obtained against him this fraud: he is not allowed his day (i.e. 6 months) as when he is Deft.

3 Atk^o - 520
1 Atk^o - 75

Such acts of an Infant as do not affect his own interest, but take an effect from an authority he exercises with which he is vested will bind him; thus if he in the Capacity of an Ex^r - received a payment due to the Estate the payment is good, and cannot be recovered because he was infant. All acts he does in an Office which he may execute are as valid as if he were an Adult.

3 Burr^o 1802

Also, an Infant is not regularly bound yet if after full age he promises to perform a

Con -

18 Aug 1890 Contract made in his Infancy, he is bound
 28 Rep 700 tho. it were not for Infancy. & Thus if an
 28 Feb 203, Infant buy a Horse, and after attaining full
 15 Feb 131-2, age promise to pay he is bound. *Chillem. & B. 111*
 18 Feb 648 The rule does not hold when the original
 of Exchange. Contract was absolutely void: for then there would
 be no consideration for such a subsequent promise

And if the original Parol Contract
 made during Infancy was voidable and a
 28 Aug 1890 Security in Writing is afterwards given strictly.
 28 Feb 104 And by a subsequent promise at full age
 the bond binds because the void security is not
 140 merged the original Contract, which still subsists
 74 as a consideration to support the subsequent
 18 Feb 1890 promise.

But on the other hand if the
 written Security given in Infancy, were not void-
 able, the after promise made by the Infant
 at full age is not binding the Parol Contract
 being merged in the Security by the voidable
 28 Feb 134 security being given. But the presumption of such
 28 Feb 135 Security, would be affirmed by the subsequent
 18 Feb 138 promise, and the action might be supported
 on the bond or Note or instrument given and in
 this action the promise after full age might
 be replied to a Plea of Infancy.

But when a person after attaining
 full age, makes a promise for a Contract
 during

during Infancy, he is bound only to the extent
of the new promise, and the old Contract is
ratified "pro tanto," only as the new one affirms.
the new promise is the measure of the promise - *Exp. Dig.* 104
son's responsibility. Thus if an Infant promises
to pay £100, and at full age makes a new
promise to pay £50, he is only bound to pay 50
or if it is payable in one year, and after full
age he promises to pay in three years, he is only
bound to pay in three years - see an analogous
Gilbert's Law of Evidence under the Test of Emulation

When the Deftt pleads Infancy and the
Plff. replies "promise after full age" - the "onus
probandi," that he was an Infant lies on the
Deftt - the replication is upheld, by proving the
subsequent promise, and the Infants must prove
that he was not of full age

10th p. 648)
Exp. Dig. 104
3 Bac. 132 at
Selwin 141

It has been determined in the *Ch of Ex* - page 225
row in *Conso* - that the *Age* of an Infant is
void. - but I doubt whether the promisee is
bound. - An Infant is arrested upon a Cause
of action in which Infancy is a good plea or
defense, he is not to be discharged in a summary
way, or motion, or like in some Courts or
Common Pleas, but must plead his Infancy.

I am next to consider what Contracts
made by Infants are void and what voidable
and here

and here I would premise, that even Contracts
in which an Infant is not bound & either void
or voidable.

Of justice here Geo. of later
law inclined to construe the Contracts of Infants
Inf-938 which don't bind them as voidable only, and
1 Burr 500, not void absolutely; this is more advantageous
3 D., 1865, to the Infant Plaintiff, because when he attains
full age he may take advantage of the Con-
tract and ratify it or not as he pleases —

Now for the sake of example I suppose
an Infant enters into a Contract to purchase a
House, the money to be paid at full age, —
Geo Chas 502 Now if this Contract be only voidable, he may at
Moore 105 full age agree to it or not: It is otherwise
Halle 730, when void, for a void Contract can be neither
3 M. 310, annulled by any one. It is laid down in
1 R. 33, the first place as a rule of discrimination,
D. 38, 54, that those Contracts of an Infant in which
2 R. 314 511, there is an apparent benefit or semblance of
benefit to the Infant are only voidable, — but
it is otherwise when there is no apparent ben-
efit or semblance of benefit. Contracts in this
latter case are absolutely void.

I have no doubt that the former part
of the rule is so, which makes Contracts void-
able is strictly correct; but the latter part is
questionable. Under the first part of the rule,
the

the Purchase of an Infant is Considered only,
and under it the Purchase is only Voidable. For
cause. Suppose to be for his benefit. But surely
every Purchase cannot necessarily be Beneficial
Why should it be more so than his estate? and
therefore the reason assigned is not a true one -
the, as it respects the first part of the rule, it
will lead to the same result as the true rule -

1 Inst. 23. 87
1 Balc 730.
2 Kent 303
600 p 320.

Upon this principle, also it is said a Pro-
curator of an Infant, by an Infant to mislead himself
of an Estate, is only Voidable, because it is
for his benefit. The rule is said, however false
the reason may be.

1 Balc 730
3 Burr 1808
supra p. 238.

So also it has been recently determined that
an Assent by an Infant to serve in
the Chamber of a Servant is only Voidable. -

286. 11. 511

On the other hand, as to the latter branch
of the distinction, "that those Contracts which
have no demonstration of benefit to the Infant are
Void." It is said a Lease by an Infant not to
serve, rent is Void: and the rule goes further. And
if a lease be annexed not equal to the annual value
and value it is Void. Whereas if it be an equal
table rent it is only Voidable.

12 Mod. 102
1 Moore 115.
2 Leon. 210
Dyer 337.
130.
10 Mod. 102
10 Mod. 421.
D. 424.
D. 430. 333.
Ex. 10. 11.

But with regard to this rule, that an Infant
may, renewing a lease, rent is Void, opinions
are contradictory, and what has never been a

3 Burr 1800.

Little 547 judicial decision on this point: it rests only
 on a ^{1st} 308 opinion, and that one many might call
 Devins 78 theotics a p. the rule.
 Moore 338

But in the next place Ed. Mansfield
 in the Ch. of Eng. in the Case of "Hutch and
 3 Burr 1804. Pardons" unequivocally decided this to be Law,
 and settled it on Principles satisfactory.

It is well settled by Common Practice in Eng-
 land that an Infant may lease without Bond
 3 Burr 1809 for the purpose of trying his Title in Equity
 3 Burr 1809 But a reason "in Law" is that
 1 P. C. 38 an Infant, if he can in no Case, avoid the
 1. R. 2. 54 Lease on the ground of the Lessee being an In-
 2. R. 2. 54 fant: now this amounts to a full demon-
 stration, that a Lease is only voidable and not void,
 page 232241 if it were void any one might take advantage
 of it.

It would lead me asid ab to enquire
 as to the discrimination of things void-
 able and absolutely void. The Jew: it is certainly
 of more advantage to the Infant to consider
 his Contracts merely voidable and not absolutely
 void. One reason assigned by Ed. Mansfield
 to prove that a Lease is not void, was that
 an Infant could not place, "New est factum"
 and therefore it is ^{not} void: but this part of his
 argument appears to have very little weight
 Co. Lit. 926. it is incorrect because a Power of Attorney
 is-

is strictly void, and yet the Infants Court is said
"non est factum" to it

It is quod, said in our Lecture 3rd -
Doct, that a Penal Bond given by an Infant is
is absolutely, void on the ground that there is no
apparent benefit or semblance of benefit to
an instrument which might subject him to
oppression. I don't however think intere the
true intention. - Now upon these authorities,
marshalled on both sides, it would appear if
possible to say what the Law is, therefore we must
proceed to consider whether it is void or voidable

As the Infants is not bound and can avoid
the Contracts when voidable only, his prop interest
can never be affected, by leaving an election in
him to avoid it or not: - the generally Law never
binds the Infants without his will. Therefore
it can be of no disadvantage to him. - And the
Infants does appear to me in all cases of execu
utory Contracts to be perfectly safe and therefore
whether it be absolutely void. - I consider
it as advantageous to the Infants to be only
voidable.

I observed in the first instance that
it is said, an Infants Court is said "non est
factum" to a Penal Bond. - but this is not
concluded, altho. I think it of some weight
because it is a good rule that "non est factum"
may

Reed 729
Mow 549
C. & P. 920
Houlton 160
Reed Cont. 54
C. & P. 104
Confid.
Silt & Silt 239
1st 172
Futures on 120
2^o - 154
Ward 403
30 Bar 1804-5
Sed
10 days 585
Holt - 289

Salk 279
5 Coke 119
Salk 348
5 B. & P. 337
3 B. & P. 1804-5
2^o - 1808

may be plead to a Bond Strictly Void.

1802 Feb 28th
1802 Mar 4th
1802 Mar 11th
1802 Mar 18th
1802 Mar 25th
1802 Mar 31st
But in the second place we have the
authority of Ct. of Equity that a Bond
given by an Infant is only voidable and not
void: indeed if it were to be regarded as strict-
ly void, it would be impossible for a Ct of
Equity to render a performance.

After the examples yesterday given I think
I am authorised to observe that the Court has
said down in the rule "that all Contracts of
Infants, where there is no appearance to each side
of semblance of benefit are void" is very ques-
tionable, not only because it declares Contracts
void but that it is too indefinite; it seems ar-
bitrary, it is not supported by any principle
of Law nor is it consonant to reason.

The first branch referring to Contracts void-
able only, relates to Purchases and seems correct
but as to the last branch relating to "Sales"
"Conveyances" "Leases" and "Obligations" made by
an Infant it requires some explanation
Leaving alone the former branch then, I will pro-
ceed to consider those Cases that come under the
latter branch of the rule, and here I conclude

Delins 5a 12
D. J. 19
3 B. & W. 184
2 B. & W. 254
Whist 730
that the true criterion is that all Gifts, Grants,
Sales, Bonds or Obligations, made without manual
delivery by Infants are Strictly Void. It is other-
wise with those that do take effect by manual
delivery

delivery they are only voidable. This rule is laid. Saleb 10
 cases by Perkins and by Coke who it has been said
 justly said is the Law itself; and it was recog-
 nized in the case of "Hauke and Pardons."

It is difficult to lay down a rule of dis-
 crimination, and not Confound the former and
 latter part of the rule. We shall therefore
 to the latter branch of the rule, relating to Gifts, Grants, Sales, Deeds, and Obligations, particularly in *Perkins* 184 3
 is difficult. Thus a Troffment by an Inf- *Perkins* 259
 fant must be void or voidable, the rule is that *Coke* 123
 it is voidable only, because there is a manual
 delivery, by which the Troffment takes effect *8 D. - 42.*

Again if an Infant Contracts to sell. *Perkins* 12
 a Horse, and deliver him, the Contract is only void *D. - 89.*
 able, because there is a manual delivery. *Hobart* 77.
 But if he make an executory Contract, and *Saleb* - 10.
 not deliver him, the Contract is absolutely void. *3 B. & C. 139.*
 for there is no manual delivery.

But the question here occurs what is the
 principle on which this distinction is
 founded? I reply that it is unfortunate that
 none of our Books give the reason of this dis-
 tinction. It appears it founded upon this viz
 Where the Contract does not take effect in man-
 ual delivery, the other party depends upon the
 Infants "Word" - and this is regarded in the Law

as nothing, he may Contradict it: but where there is a manifest delivery, it is otherwise. He cannot Contradict his own act, for it changes the very supposition of the Property, or subject matter on which the act operates. - This is the only probable reason, and seems a little technical.
 3 Burr 1804 Now the words that take effect in this.
 Perkins on 12 Rule, "by delivery" - are an essential part of
 5 C. & D. 259 the rule. - they make a difference between a
 8 C. & D. 422 deed which conveys an interest, and that which
 20 C. & D. 119 only delegates a power. Thus a Deed by Deed
 5 C. & D. 119 made by an Infant, or a release is only voidable
 Shephard 60 because they take effect only by delivery -

3 Burr 1804 But on the other hand a Power of Attorney
 20 C. & D. 180 executed by an Infant is void: for this case,
 10 C. & D. 577 not taken effect within the meaning of the
 20 C. & D. 578 rule, by manifest delivery. It is only a dele-
 10 C. & D. 578 gation of a power, not a passing of an interest.
 2 Roll + 2 There is an Exception to this latter rule
 page 255 and this is the case mentioned yesterday by Sir
 10 C. & D. 730. When a power of Attorney is given to accept
 3 Burr 1808 of rents, this is only voidable because
 it comes within the first branch of the rule "viz"
 it has a semblance of benefit to the Infant.

I would have observed that Power of Attorney is the difference between those that convey an interest and those which do not, or that manifest delivery is the Gen. Rule of discrimination, but giving no reason for his opinion.

But after the rule laid down by Lord Mansfield in the case in Douck and Parsons & that laid down by "Perkins" it is safe to say that this rule is general. We must establish some result, and the Law appears to me to be contained in the unity of those two rules which I have given. manu ad delivery, and sublance of benefit, will in all cases determine whether the Contract in question is Void or Voidable.

But upon the whole the Law under this head seems to be included under the first branch of the first Gen. rule of yesterday, and the second Gen. rule of today. - I do not consider the latter branch of the first rule to be Law.

The consequence of all these distinctions then is that Partners by Infants are only Voidable this comes within the first &c. And with regard to third &c. &c. the rule also is that where they take effect by delivery they, are only Voidable. If they do not take effect by delivery they, are also Void. But Lord Mansfield qualified the first part of this rule by saying that if a Case should occur where considering the Contract only Voidable, would be injurious to the Infant, then for that reason it might be considered Void.

The interests of the Infants then may in some cases render his Contract absolutely Void tho. it took effect by manu ad delivery.

D. Hard.

* page 232
* page 238

one exception
see last page
see also next page
3d Nov 1807-8
1st Nov 1809
3d Nov 1809

There is one particular example, and but one
 other, in which a Contract that took effect in
 manual delivery was declared void. This is the
 famous case of the Barber, who contracted with
 3 Table 389. a young Lady and her father for two ounces of her hair.
 She agreed to it not knowing how much it would
 take: it took all she had off of her head: this of
 course took effect from delivery, but it was certainly
 a great abuse. He being too crafty to know how
 much it would take, but she did not. The Ct
 held the Contract strictly void, and determined that
 Spauld and Rattery would lie.

I read I suppose another case in which a
 Contract is void, - Suppose a Bankrupt imposed
 upon and seduced and agreed with him for a House
 he is to depend upon the Bankrupt for payment.

Now if the Contract was only voidable he would
 have to bring, Proves and be put to expense, and
 trouble before he could recover - But if it is ab-
 solutely void, he might go and take the House
 wherever he could find him,

Where his privilege cannot be supported without
 the Contract taking effect by, manual delivery
 be considered absolutely void, it would be so consid-
 ered, otherwise it would be held only voidable.

The Contracts of which I have treated except
 1000 Cont. 387 that of a Penal Bond are Contracts executed,
 1000 Cont. 387 and with regard to those executed by Infants
 1000 Cont. 387

Thun,

they are in Gen. only Voidable. Thus a Parcel Aug^r 85
 Purchased a Field & Exchange, or a Single Bille D^r - 937
 given by, and Tufant are only Voidable. because 10th Aug^r 41
 this is considered most beneficial to the Tufant,
 upon this point there is no Controversy.

And upon this ground a Contract by, and
 Tufant to submit to an Arbitration is Void
 only.

5th Dec^r 330
 Nov^r 93
 18th Dec^r 730
 1st Dec^r 17

The distinction, between a Contract Void
 and one merely Voidable is very important as to
 its Consequences. I hinted at it before. but I now
 come to treat of it more particularly.

If a Contract is absolutely Void either Party
 may take advantage of it, and so may a third
 person whose interest is affected by it. Thus in
 a fraudulent Conveyance a third Party may res-
 cind it void. As if A makes a fraudulent Con-
 veyance to B. for the purpose of defrauding
 Creditors, third Creditors may rescind this Contract
void.

page 232

But a Contract is only Voidable, no
 advantage can be taken of it but by that par-
 ty, and his representatives, from whom it is conveyed.
 Thus a voidable quality arises.

2nd Dec^r 103
 4th Dec^r 104
 1st Dec^r 430
 1st Dec^r 938
 2nd Dec^r 511
 3rd Dec^r 1800

and many others

If a voidable Conveyance be made to
 Read Entails the only Person that can take
 advantage of it is the original Party, and the
 priority of blood is the original Party, and his
 heirs.

8th Dec^r 433
 1st Dec^r 337

1 Rolle 788. Void at Law - because void at Law. void
 8 Co 42-3 is a representation of Real Property. If the
 1 Inst 337. Defendant has a Particular Estate at Law, the void
 1 Rolle 788. mention of remainder-man cannot avoid it

Another distinction between an Act Void and
 23 Bagg 69. Voidable, is that a Voidable act may be ratified
 5 Co 534. by an Infants after he attains full age, and this
 16 Bait 131-2. Ratification may be either express or implied
 1 Inst 337. It is implied when after full age he acts
 24 Inst 203. under the Contract, and receives the benefit of
 Co Jo 329. it - thus, where a Lease is made to an Infants
 and after he attains full age he continues to
 hold and pay rent, this is an implied ratifica-
 tion. So also if he make a Lease and receive
 rent after full age.

3 Co 63. And here it may be laid down as a Gen.
 11 Co 599. rule that any Act done by him after full age,
 Co Jo 171. evincing an intention to revive, the Privilege
 D. 299. of Infancy will affirm his voidable Contracts.
 28 Bait 263.
 Co Jo 320.

1 Inst 132. On the other hand a Contract absolutely void
 23 Bait 705. can now be ratified, it is a nullity, nothing can
 3 Co 64. ratify it. It is said a recognition at full age
 16 Bait 73. may ratify it, but this is not so, for there it
 Co Jo 261. is a new Contract
 D. 1482.
 4 Bait 83.
 15 Bait 74.

"All Gents" suppose the re-
 cession might be done on the old Consideration,
 because this will be as good in a Void Contract as
 in one Voidable

There is a distinction between the time th Lecture D
and manner in which an Infant may avoid
a Voidable Contract.

As to Conveyances by Deed
and Recovery, by an Infant, if he would avoid
the Contract he must do so in infancy, & not
after: this is a judicial Conveyance by in ab- 12 Coke 122
ten of record the manner in which it is to be 1000. Cont 121
avoided is by Writ of Error, this must be done D. in 23
before he attains full age: and the reason is 3 Mod 229
that he must be sued by, inspection, of the 12 D. 197
Jury, and as the Conveyance is by matter of D. 243.
record, no averment agt. the record can go to the
Jury. The Infant cannot avoid the Conveyance
after he attains full age.

- With regard to Conveyances in Part.
i.e. by Gift, mortgage or Deed, not by matter of 3 Burr. 1808
record it has been held by some that he may 3 Burr 1307
avoid them either before or after he arrives at 11 B. Rep. 576.
full age: this is not correct: The rule seems 20 Rep. 151
to be that in Gift, mortgage and the like the Con- 11 B. Rep. 192.
tract cannot be avoided until he attains 10 B. Rep. 247.
full age: because his avoiding it before full D. 248.
age would be voidable. D. 356.

The rule is the same as to a Lease for years
i.e. he can avoid it until after he attains 25 Rep. 151
full age: there are several ancient opinions. 3 Burr 1378.
Contract

2 Bait^r 09, 1 Ash^r 388, *contra* applied to this. but this is now the rule as
 settled by Lord Hardwicke's Manifesto and
 Henry on. Justice Buller observes "if an
 Infant makes a lease for years he is bound
 by it. this is to be understood that it binds
 him during his Infancy. he cannot avoid it
 while he is an Infant."

Now the head of Contracts there remains
 to be considered some examples in Equity.

Marriage Settlement agreements made
 by Infants with consent of Parents or Guardians
 are in most cases binding in Ct of Equity tho.
 they are not in Ct of Law. But Equity has
 now Enfranchisement of these Gen^l. If however these
 agreements could be enforced in Ct of Law they
 must be enforced "in toto" unconditionally and
 this might be injurious to the Infant. but
 it is allowed in Equity that it may be enforced
 provisionally according to rights and as will best
 suit the exigencies of the family.

But it may be asked by what authority
 Ct of Equity can enforce these Contracts. &
 I observe as I formerly did that Chy. a James
 28 Nov 501. a Gen. Court over Infants. that as Guardians
 they may enforce them. Thus it has been so
 4 Cranch 194. 100. 101. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.

making a ^{family} Marriage Settlement

Agreed it seems fully settled that a female Infant may have her right of Dower 55. & D.C. 57. or by accepting under a Marriage Settlement 24. & 11. & 12. a Jointure in right of Dower, and thus the 1st D.C. 53. is well only of Personal Property - observed 18. & 55. all these Cases must go with Consent of Parents.

But whether a male infant can bind himself in the same manner a female can do (id. by Marriages Settlements, is said by "Fort-Blaque" not to be decided. But Cruise says 2 Ed. Ch 211 he cannot as the rule is now settled. Th. has 1802 32
now decided that when a Male Infant has ¹⁸⁰⁴ ~~1802~~ 204
a Guard on Lives and with Consent of Parents ¹⁸⁰⁴ ~~1802~~ 204
made a Settlement, in Consideration of ¹⁸⁰⁴ ~~1802~~ 204
riage, upon his Wife, that he was bound by it. 4 Cruise 19,
there is a good deal of Controversy on this sub-
ject, and it is difficult to promote it in

It has been holden by "Macklesfield"
 that if a Female Infant dies in her Cove-
 nant on marriage, in consideration of her suffi-
 cient Settlement and with Consent of Parents, to
 grant that when Husband she is bound by this
 Covenant, that Lord "Thurlow" said that to
 be Law also Woodcock and Priest, held the
 Rule as laid down by "Macklesfield" to be in
 correct, I apprehend the Rule is not to be considered
 as Law -

28 Nov 1743
 3 MS 803
 D. 115
 B. 116
 4 D. 510
 3 W. 243
 4 O. 1718
 page 109
 Ed

15 Feb 60 70. At any rate it has been always agreed that such
 3d Feb 60 1500 Contracts must have been made before the
 3d Feb 60 514 Marriage.

But whatever may be the opinion
 2d Feb 60 428 as to a Male Infant's power to bind his Estate I
 15 Feb 60 70 I suppose he cannot. In a Case where a Male
 4 Feb 60 19 Infant upon marriage with an Adult is obvious-
 ly to the marriage Covenant to carry his
 Real Estate, to certain uses, he is bound by it,
 and cannot claim the use of such Estate.

And further in none of the Cases with the
 2d Feb 60 444 agreement made by the Infant he enforced
 10 Feb 60 115 unless it appears, to the Ck that the agree-
 11 Feb 60 115 ment was fair and reasonable, and he got,
 15 Feb 60 70 without it is an adequate Consideration, -

If an Infant capable of making a Will
 bequeaths Personal property for Payment of
 Debts the Ex^r is bound in Equity to pay them,
 10 Feb 60 382 altho the Infant himself could not have been
 15 Feb 60 37 compelled to pay them: - this again is a rule
 18 Feb 60 103 of Equity. At where an Infant makes a bequest
 15 Feb 60 74 of a County it was allowed to be paid. So it shall
 be performed more especially when the object
 of it is to be just, for the Maxim is that a
 man should be just, before he is generous.

I have observed in a former Lecture that an
 Infant's Contracts may be ratified in Law after he
 attains -

attains full age. but in a Ct of Equity Cond.
 made made by another person for his Infants
 may be expressly as well as impliedly ratified
 by him. after attaining full age. & he may
 expressly ratify it or he may do acts which
 impliedly ratify it. as receiving rent on a Lease
 of his Land made by another person. and with-
 out his Consent. These remarks close what I
 had to say with respect to Contracts by Infants

What powers an Infant may
 execute. By a power is here meant
 a delegated authority: the enquiry is what dele-
 gated authorities an Infant may execute?

As a Gen Rule he can execute a General
 power over real Estate for the very reason of age. 18 Gray 298
 his disability is the want of discretion. 304
 if a man should devise Real Property to an
 Infant to do with it what he pleased he could
 not exercise that power for want of discretion. 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

But an Infant may execute a Naked
 Power, for he has no interest of his own. because 304-14
 the power is special, and requires no discretion. 305
 to be exercised. Hence the Infant is a mere instrum. 306
 ment, he has no interests to be affected and needs 307
 no discretion. E.g. I give a power to an Infant
 to convey my House and Lot to "J. S." now as no
 discretion is necessary, as it points out the manner
 in

and at last it is to be so and he may as well execute
it as any other person.

But an Infant cannot execute a Power
over his own Land, because if he could do this.
he might evade the disabilities the Law imposes
upon him, for his own Protection.

I would here take the opportunity of advising
you that in a leading Case in "Albion" the
Court has decided that an Infant has never been allowed
to execute a Power over a Real Estate - he obtains
by means a Genl Power.

From the rules already given it follows that
an Infant whose interests is not affected by the
Power given him may execute a Power over Real
Estate so as to bind - provided it does
not amount to a discretionary Power.

He may execute a Genl Power over
Personal Property provided he is old enough to
bequeath Personal Property by Will. This is
thought to be reasonable and consistent. (The Infant
may dispose of personal Property by Will, at 17 at
any time and some say at 14)

And where an Infant who was married for
Life with Power to make a jointure in pursuance
of that Power. Coverture is made a Settlement and
his Wife for his own Life it was held good. This
Power

this power was a special one, he was tenant for his own life. Thus much with respect to powers.

What Offices an Infant may execute. Section 7th
June 29th 1812.

An Infant may hold a ministerial office which requires only skill and diligence but he cannot hold a judicial one. — 3 Inst 3.
Cro Eliz 636.
Comm. Digest
Title Offic. 33

Thus he may hold the office of Sheriff or Mar-
shal, Bailiff, Taylor, Deputy Sheriff &c. these offices
are ministerial and not judicial.

The reason assigned why he may hold a ministerial office is that if he be incapable of doing it in person he may do it by Deputy. 11 Coke 4.
Cro Eliz 379.

Now an office according to the principles of the Common Law may be an estate if then such an office devolved upon the Infant and he is incapable of executing it he may have it done by Deputy. D. 350.
Cro Eliz 153
4 Mod 379.
Vol 2. 321.

And I conceived the Q. B. Judge to be that an Infant can execute no office except those which can be executed by Deputy this I infer from the reason given for his holding a ministerial office. Now I suppose the right to an office devolved upon an Infant of discretion, if he cannot execute it by Deputy he cannot hold it at all.

It is difficult to say what the Law of Common may be on this subject: there is no instance I presume where

an Infant has held an Office. We have no offices that are transmissible. & it is otherwise in England, there there are Offices which are transmissible. Now I don't presume that our Laws were intended to let an Infant be a Sheriff altho a Sheriff's Office may be executed by Deputy. - I believe we have no Office but Sheriff's that can be executed by Deputy.

And as to our Law an Infant can't be an Attorney, and the reason assigned is that he 2p. 6. 323. can't take the oath of Office. Now can he be a 3. B. 2. 120. Juror. Grand or Petit. Whether the reason assigned is a Court one. I know not. But whatever may be the reason, he certainly can't be an Attorney or Juror.

And Infant executing such an Office as 2. C. 27. 6. he may hold is bound by his official acts 2. D. 44. 6. and if he is as liable for neglect and 2. D. 364. fault in performing his duty as an Adult. 3. Mod. 223. Thus an Infant factor is liable for an escape.

The rule is upon a principle distinct from that which regulates his Contracts, for if he holds an Office for his own sake under the Government, he must on the other hand be liable for a proper discharge, and answerable for a breach of duty for the public's sake. - Thus much with regard to the Office, he may execute.

There

There are now distinctions to be observed, between the performance and non-performance of Conditions annexed to his Estate.

We will first enquire how far an Infant is affected by a Non-performance of the Condition annexed to his Office or Estate ⁱⁿ any express Condition and Infant is regularly bound, as an Adult: an express Condition is one specified in the Instrument Creating the Estate. ^{1 Inst. 245} 8 Co. 44 or Office. If then an Infant holds an Estate, ^{2 Wms 333} to which there is an express Condition annexed, ^{D. 580} imposing a forfeiture, he forfeits the Estate by ^{D. 343} Non-performance: this rule seems founded upon ^{2 Dwins 21} common justice. Thus if a Seignior is made to ^{1 Inst. 99} an Infant with a Condition that upon non-^{Cartter 43} payment of Rent annually he should forfeit it is it more than just to allow forfeiture on non-payment? Certainly not.

There is an exception to this rule: and that obtains where the Condition imposes a Penalty, distinct from the loss of the Estate, here the Infant is not bound to pay the extra penalty. ^{1 Inst. 245} For from this penalty the Infant can derive ^{1 Inst. 200} no advantage. Whereas in the Estate he may be ^{Cartter 43} benefitted. This part of the Condition imposing a penalty is void, as if on non-payment of Rent at the time he is to forfeit the Estate and £1000. here he is not bound to pay the £1000. And.

Now Infants then each complained if the forfeits are to only, of the King granted.

This distinction relates to express Conditions, there are also implied Conditions. Lord Coke, remarks that these implied Conditions, are either founded upon Oath and Confidence, or oath, and confidence upon Oath and Confidence. The first founded upon Oath and Confidence are annexed to some Office. The second not founded on Oath and Confidence, are annexed to Estates. —
 8 Coke 44^(c) Now by the first which are regularly annexed to Office, an Infant is bound for his po-
 1 Inst. 233^(c) tential. E.g. Suppose he be Sheriff and by any remissness, mismanagement, or misconduct he forfeits his Office; the public requires that this should be the case.
 1 Inst. 233^(c) 823^(c) 823^(c) 823^(c)

But by the latter Clasp, by implied Conditions not founded in Oath and Confidence which are annexed to Estates, and Infants regularly is not bound. These last I repeat are given, and perhaps annexed really annexed to Estates, and not to an Office. — Thus an Infant forsook for Life aliens and fed, he is not bound, he does not forfeit the Estate. — This latter rule is founded on his incapacity of Infancy.

There is a distinction to be observed as to the ^{condition} this comes under a distinction implied, by that Law. The first is that where a Statute gives recovery, e.g. the Statute for Waste, or other damages done to the

Statute.

Treachery, and Luffant is bound by its law by Stat. *Prosser 354*,
 for Waste and Luffant, say still, whether Voluntary, *1 Inst. 54*,
 or permissive. The Stat. of Glouceter gives an *Fitz. 823, 59*,
 action to recover not only the thing wasted, but
 also treble damages

I want here observe that by the Com Law
 there is no forfeiture for committing Waste, the
 recovery is ag^t the Tenant by damages only —

Now the Stat. Law gives merely an entry, *8 Coke 44*,
 and no recovery, i. e. no action for damages, *1 Inst. 233*,
 violation of an implied Condition, the Luffant *1 Fentl. 823*,
 is not bound by a breach of the implied Condition,

Now in England there are certain Statutes in
Mortmain, where Stat^s make alienation in Fee,
void. If a Luffant alien in Mortmain he does
 not forfeit the Estate, — but it is otherwise with
 an Abbot.

There is no reason assigned for this.
 latter rule that I can find. I would say it may
 be this, "in the former case where the Stat^s gives
 a right of action for Waste to recover the Estate,
 it is not expressly taken away, but reverts to the
 Grantor; But in the latter case where the Stat^s
 says, "the Lord may enter, the Stat^s does not ex-
 pressly take away the Estate."

Perhaps the reason is that in the latter case
 it wants to be ousted by mere implication and the
 Law will not allow these rights to be affected by
 implication.

implication. Infants are also bound by the Stat^s of Limitations without they are expressly Revised 31 excepted. Stat^s of Limitations are in the 16th Epist. 384 here of a Condition annexed to a right. Infants The 16th 318, Stat^s there is almost always a saving Clause as to "Infants Tenes Covens," "Curatels," "Persons of non sane memory, &c &c

And if an Ex^{or} or Adm^r or a Trustee, does not sue for the Infant within the time prescribed by the Stat^s of Limitations he having a right to sue, the Infant is barred by the Stat^s the exception notwithstanding: this requires explanation. It must be understood that the suit must be brought in the Ex^{or} or Adm^r's name. Revised 309 it is not to be understood where the right is in the Infant, and of suit must be brought in his name: he forfeits if the Ex^{or} Adm^r or Guardian neglects to sue within the time. But for such neglected the Ex^{or} be are liable over to the Infant.

Under the next division we will consider, In what manner Infants are to sue and be sued.

I have already treated of Infants Rights and Duties, here I shall treat of the means of enforcing their rights and performing their duties.

1st I shall consider how an Infant may sue or bring actions. 2nd

2^d How he may be sued.

As to the first, the rule is, he must always sue by his Guardian, or Prochein Amy, i.e. his next friend. Now when an Adult sues he must appear in one of two ways viz, *Palmes 325*, either by Attorney, or in person. And Infants *Do* ~ *250*, cannot do either of these: he cannot appear *him* *Thibby 409* self, because he is supposed to want discretion, *Do* *420*, And for the same reason he cannot instruct *Page 239*, an Attorney; and another reason is, that it is settled that a Power of Attorney, given by an Infant is absolutely void, and as he can't give a Power of Attorney, he certainly cannot give directions to an Attorney to appear for him.

Second the rule is that he must sue by Guardian, if he has no Guardian he must sue by, *Prochein Amy*, ~ If an Infant sue in his own name and without Guardian the Dofft may plead to his disability, and thus defeat the action. *Palmes 293*, *1 Inst 135*, *Caithed 123*

By the ancient Com Law and Infants *Co. fo. 640*, Dofft could only sue by Guardian and not by, *Palmes 293*, *Prochein Amy*, - But by Stat of Westminster, *Thibby 409*, 1st and 2^d, an Infant is allowed to sue by his Self *709*, *Prochein Amy*, in some Cases, But these are Cases of necessity. The Cases in which he is allowed to sue by, *Prochein Amy*, are four. viz, The first is when it is necessary to sue his Guardian

and it must be by "Prochein amy" if he could
 Cro. fo. 540. not sue by "Prochein amy" he could be remedied
 Hutton 92, and it is not impossible that a case should occur
 where the Guardian might commit a breach
 of trust and violate his rights.

2^{dly} Where the Suit is br. agt. a Stranger,
 and the Guardian tho. consenting to the Suit
 Palmer 295 will not appear for the Infant. — he must
 Cro. fo. 540. sue by "Prochein amy" The words "not
 Stiles 309. consenting to the Suit" are emphatical tho,
 Kirby 409. not, remitted as such in the rule laid down
 in the Books. — If the Guardian does not
 consent, the Infant cannot sue at all, for
 the Guardian can appear and put an end to
 it.

3^{dly} An Infant may sue by his "next
 1 Inst. 135. friend", when he has no Guardian. — for there
 2 Inst. — might occur a case, where the Infant might
 suffer before a Guardian is appointed.

4^{thly} Where an Infant having a legal Guar-
 Cro. fo. 540 dian is in legal language "disigned from him."
 2 Inst. 580, i. e. out of the reach of his protection he may
 Palmer 295 sue by his "Prochein amy."

In all other cases it shall be must sue
 by his Guardian only. according to some opin-
 ions an Infant may sue in any case by Guar-
 dian or "Prochein amy" but I apprehend this is
 not correct and why should there be any exception here?
 and.

and it seems to me unreasonable, for then the
Guardian's power is taken away, and any individual
might bring a writ calling himself Trustee 183
Prochein Amy. Now if the Law puts all the
Infant's concerns under a person appointed for
his capability, and integrity, and yet allows any
other to sue, it is contradictory.

These rules relate to Infants in General
but if Husband and Wife sue, the Wife and
Infant only, she need not appear by Guardian whereas 213,
if she be an Adult she can appoint an Attorney
for both, she has nothing to do, the Husband
is considered as Guardian over her.

When an Infant sues by Guardian the
Guardian is considered liable for Costs and is 1020
compelled to give security for them: the rule is 500,
the same as to "Prochein Amy." If Costs are
not paid, proceedings are to be had against the
Guardian, as the, it was in his own name, 1020
1 Willard 130
12 Rep. 491

But I would here observe that the Guardian
he does not finally bear the burden of
these Costs; his disbursements are to be allowed
upon settlement of his Accounts out of the
Infant's Estate. There is an opinion that the
Infant is also liable in the first instance. This
opinion was afterwards denied upon a rehearing
before Lord King, and this is now the law.
The

Sug^r 708 The Infant is not to bound by Stat^e and
 Ecc^l 33 this rule is analogous to the Corn Law rule.
 1841^r 109 for by it no Costs were originally allowed, the
 Ecc^l 100 Stat^e of Gloucester first gave them. But at the
 1841^r 130 the Infant was not originally liable for Costs.
 1841^r 238 he was liable to amendments "*pro falso Causare*"
 1841^r 238 which was a substitute for Costs. I cited the
 rule to be that laid down by "Lord King" that an
 Infant is never liable for Costs. And if Costs
 1841^r 1217 are awarded ag^t an Infant & off. the judgment is
 1841^r 93 erroneous. It is error. -

Section 8.^b I observed that according to the former
 opinions an Infant & off. is never liable for Costs
 but an Infant & off. is always liable for Costs in
 Sug^r 1217 as much as an Adult. His Infancy can't protect him.
 1841^r 189 Because where an Infant is & off. he is suppo-
 1841^r 104 sed never to manage his stick. but his Guardian
 or "Prochein amy" to do it for him. But where
 Judg^t is rendered ag^t an Infant & off. he is always
 supposed to be in fault. Such Cases generally
 arise "*ex delicto*" his Guardian does not participate.

It is the practice in England for the Guar-
 dian or "Prochein amy" to be admitted by the Ch^r
 Sug^r 304 to appear. or by a Writ out of Ch^r. The object
 1841^r 232 of this rule is to prevent the Infants interests
 1841^r 250 from being committed to improper hands. It
 3. 1841^r 803 is therefore necessary by the English practice that
 he be admitted to represent by the Court.

But in Conn where the action is brought
by Guardian. our Ct. never enquired into his qual-
ifications he is admitted of Course: If however
an action be br^d for the Infants by his "Pro. 11th May 410
chein any" he is to be admitted by the Courts, as PD 419.
in England. The reason why a Guardian may

appear without an allowance, is that he has been
appointed to act as Guardian, and therefore sup-
posed qualified, but it is otherwise as to Prochein
any

And the rule in this County, as well as
in England is that any one may bring a Suit, as
"Prochein any" for an Infant, and it may be 22nd 880
done without Consent of the Infants, as he is Con- Prochein 74
sidered incapable of giving his Consent, therefore 11th
it is right that it should be ascertained whether
in the "Prochein any" is a judicious person or not
True he does it at first at his own risk, but
shield by his mismanagement, the Infants is
barred of his rights of recovery.

The result of the Law is that any one may
commence a Suit for an Infant, but it de-
pends upon the Ct. to say whether they will con-
tinue it or not. Now it is observed that if
an Infant and Adult are Co-Def. and bring a 10th 114-
Suit, the Adult Ex^{or} may appoint an At-
torney for both of them. (However, the Infants Prochein 288
is for another his duties are ministerial. Q. B. D. 11th 278
But.

Co. Eliz 541 But on the other hand if a Suit is Civ. agt.
 2d. Sec. 2120 two such Ex.^{rs}, there the Court cannot appoint
 D^r in 213 an Attorney for both. The Infant must appear
 Kent. 102 by Guardian, for where they are sued it may be
 2d. Ray 233 that they are strangers to each other, the Infants
 D^r 500. may deny that he is Ex.^r But in the former
 D^r 1449 case where they bring the suit, they acknowledge
 themselves to be the Ex.^{rs}

To the contrary It has been said that when an Infant
 Co. for 420 is Sued Ex.^r and brings a Suit he may ap-
 D^r in 441 point an attorney and appear by him in the
 Contra. Suit: but this has been overruled, I apprehend
 Carthw 138 it is not now Law. the true reason is that he
 2d. Sec. 213 wants discretion: he is not capable of appoint-
 ing a proper Person for his attorney.

Under the present decision I have been
 considering an Infant D^r: how Infants may
 sue and stand may be considered how they may be
 2d. Sec. 180. Sued. Gen. rule an Infant must always
 Palmer 228. appear by Guardian: the diversity, betw. an
 D^r in 250 the case of an Infant D^r and an Infant D^r:
 Co. for 540. is that the Stat. 1 and 2 of Westminster do not
 extend to D^rs or actions agt. Infants: they
 relate to D^rs and privilege them in four
 Cases, that I mentioned yesterday. An Infant
 must appear by Guardian when he is D^r:

And in an action agt. Husband and
 W^{ife}.

and Wife the being an Infant must appear *Relo 288.*
 by Guardian, tho her Husband be an Adult. *West 185.*
2 Hble 878.
 I had had some doubts about this rule but *1821. 91.*
 I can find it any where denied *Q. 2 166.*

Supposing this rule to be Law and I sup-
 pose it is, there is perhaps a reason between this
 Case and where they (viz the Husband & Wife the being
 an Infant) are *Diff.* The reason where the Suit
 is *ex. agt.* them why he cannot appoint a
 Guardian for both is that an Infant *Diff.* may
 appear by "Prochein amy," now the Husband who
 is *co. agt.* be "Prochein amy." But an Infant *3 Hble 33.*
Diff. cannot appear by "Prochein amy," and the 2d Series 136
 it appears upon the record that the Husband is *1st. 89.*
"Next Friend." It does not authorize him to ap- *Q. 135.*
 point an Attorney; the being an Infant must *3 Hble 427.*
 appear by Guardian. If an Infant
 without Guardian be sued, the Ct must appoint
 a Guardian for him "*pro re nata*," and he is
 called a Guardian "*ad litem*," and this appoint-
 ment is usually at the instance of the *Diff.*
 and it is the *Diff.* duty to advise the Ct.
 that the *Diff.* is an Infant, and may a Guar-
 dian be so appointed. - this Guardian is genlly
 some Attorney at the Bar.

But if the Infant has a Gen. Guardian appointed *16 Jaf 2424.*
 and the Ct can't appoint a special Guardian "*ad litem*" *450.*
litem," unless the Gen. Guardian is out of reach and
 has misdeemeaned himself. *When*

When an Infant having a Guardian is
 sued the process should not only be agt. the
 Infant but also agt. the Guardian, that is to say
 the Sheriff is to summon the Guardian to ap-
 pear and defend the suit. The omission to sum-
 mon the Guardian to attend does not abate
 the suit in law and practice, but it is generally
 stayed one term, by which time is given to
 the Guardian to appear and attend.
 Cal. 10. 174. Summon the Guardian to appear and attend.
 It allow 9th to it. It is a rule of Court in England and Court
 of Sessions 58. now pursued that it should be as it is in
 200th 2187 and practice, and I presumed it is so in England

When an Infant when sued appears by At-
 torney and judg. is given agt. him, it is erroneous,
 the error in this case is an error in fact, not on
 the original record. The writ of Error is a
 Writ of Error in Error, or Error in Error (some of
 the Books have it one way and some the other.)
 It usually issues out of the court, but who issues
 the original judg.

It is also if an action be agt. and the
 Infant without taking his Guardian and judg.
 goes agt. him, by default the judg. is erroneous.
 Kirby 110. For as it judg. goes agt. him when he appears
 by Attorney as Plaintiff to a suit it is erroneous. "2
 Fortior." It should be so considered when he is
 Defendant. As to the case of an Infant Plaintiff appear-
 ing by Attorney and judg. goes agt. him, the
 judg.

Jury^{ts} is erroneous, as in this Case: and so at Com. *Case 441*
 Law if it were for him. It is erroneous, but by *2d* - 580
 the English Stat^{ts} 21st of James 1st if it be re- *1800* 93
 versed for him it is good. It is not invalidated if *2d* - 1987
 given on Verdict

If an Infant sued with an Adult ap-
 pear by Attorney, and entered damages on given
 agt^{ts} them. the whole Jury^{ts} is erroneous, and it *2d* - 1987
 was so by Com. Law. if however damages should *2d* - 2287
 be given agt^{ts} them severally it seems ques - *Case 289*
 tionable whether the Jury^{ts} would not be good *Rule 770*
 as to the Adult, but erroneous as to the Infant *Case 307*

I think it is Count to say that it is good *3d* - 435
 as to the Adult. It is a rule where the Jury^{ts}
 appears to be several that it is erroneous as to
 the Party that is privileged. "Pro tanto" - but
 good as to the rest. The rule I apply from
 analogy, more than from any principle of
 law or reason. I can find on the Subject.

Now to the point that Jury^{ts} the erroneous Com. *- Case 587*
 only reversed in part. *1800* 808
1800 2022

In *Com. v.* it has been determined that
 when Jury^{ts} goes agt^{ts} an Infant and an Adult *Kirby 110*
 as respondents tho. entered damages on given.
 that it is only void as to the Infant but good
 as to the Adult. I confess I do not discern
 why this is not a just rule. The action is for
 agt^{ts} wrongdoers, each is liable for the tort of all
 the.

The whole might have been proved against the
Atty. therefore he could complain. But this
rule of our Sup. Ct is contrary to the Com. Law

In England if an Adult and an Infant
2d Rev. 1829 join in laying a tender it is erroneous as to the
Atty. 1828 Infants only, for the interests of the two are distinct
Com. Law 118. this fine atty. in the form of a joint is merely
Q. - 1824 a common assurance, or in word simplified.

2d Rev. 1828 language it is added. executed by them by matter
of record. this falls within the Com. Law. but where
an Infant and an Adult join in Contract the
Adult is bound tho. the Infant is not

This finishes what I had to say respecting the
manners of Infants saying and being sued. —

I now wish to consider
How far the Law regards Infants "in
Vuln. &c. more" And upon this subject
the Law has undergone considerable change of
late years.

Infants unborn in Vuln. &c. more
are to many purposes. Considered "in eff. tho. not
1820 Rev. 1826 for all purposes. They are now considered "in
eff. as to many purposes to which they formerly
were not.

The killing of an unborn Child is
not now considered as Murder but as a great
2d Rev. 1828 misdemeanor. it is now willingly. By, misdemeanor
1820 Rev. 1821 is held near the highest Sort of Misdemeanor.
that is in the limited sense of Misdemeanor. —
which,

which is to be understood as any thing short of
February

But if a newborn infant received a mortal wound in the womb, and is born alive 28 Nov 1798 but dies of the wound within a year and a day, 1st March 1801, from the kind of the injury, would it will or may, Constitutio Law be considered as, it will be murder when the Galton 1433 circumstances attending the injury, are such as - would have constituted murder, if he was a living person.

the unborn infants may also inherit
 by an Estate from an ancestor. On the death 2d Nov 3089
 of the ancestor the Estate descends upon the ^{next} 2d Nov 3089
 presumptive Heir. but is defeasible, and may 2d Nov 3089
 be defeated whenever a posthumous Child is born 2d Nov 3089
 Thus where an Estate vested in a Daughter 2d Nov 3089
 on the death of a Parent, it was defeated by the 2d Nov 3089
 birth of a posthumous Son 2d Nov 3089

To also the Law is now settled. Such an Infant may take by Descent or Legacy, i.e. he may be either a Descendant or Legatee; but it was formerly held that he could not take by Descent. The Law has undergone considerable Change. For the history of this Rule see Fidd. Precedent.

But in this case where the Estate descends
to the Infants "is Vested & unrevoked. It vests in the
Heir at Law until he is bound for he may be
born dead

2d Nov. 9
18 May 14
16th Sep 35
31 July 44
Died 51.

~~2d~~ 446 Such an Infant may also take a substituted share under the Stat of Distributions 2d Ed. 11th is a substituted share of the personal property of his parent.

So also under a Term or other trust for raising portions for such Child as at A. D. 342 shall have living at the time of his death, or 2d Ed. 399, posthumous Child takes, under that.

And an Infant in age. Waste will be in behalf of such Infant, the Rule is two- by some Person styling himself "next friend" 2d Ed. 11th. "Because if the Law allows an Infant in ventre so much to inherit, it certainly should take care of the Substance."

Under the Stat 12 of Chas. 2. Such an Infant may have a testamentary Guardian appointed, &c.

And finally, he may be an Executor. s. 29 the he can act as such until he attains the age of 17, and the rule is that if in that case 3d Ed. 123 there be two Children born they become Co-Ex-
Partners. Off. of Ex-
Page 30th. And there is an analogous case where a minor is made to an Infant "in ventre so much", and there are two born why take jointly.

I now come to treat of
The relative rights and duties of Parents
and Children.
And under that distinction it
will

would be necessary, to enquire or consider who are legitimate and who are not legitimate. Because their rights and duties are different when referred to these two classes.

1st Then who are legitimate and who are illegitimate or Bastards, according to the definition given, a legitimate Child is one "born in lawful Wedlock," or within a competent time afterwards. R. H. 440
1st 244
See Jan. 541

This definition however is not perfectly complete: It amounts to this, "that as often but one born in lawful Wedlock, is legitimate, but it is not one universally, that a Child born in lawful Wedlock is legitimate: he is 'prima facie' legitimate: but as a matter of fact a Child may be illegitimate tho, born in lawful Wedlock." 1st 454

An illegitimate Child is defined to be one, "begotten and born out of lawful Wedlock," or in other words "one not begotten nor born during Wedlock."

The definition is incomplete, for I suppose that the parents intermarry before the birth of the Child, and the Father dies before the birth of this Child, is legitimate, tho, it may fall within the definition of "illegitimate," not born in lawful Wedlock. The definition I would give would be "that an illegitimate Child is one neither begotten nor born during lawful Wedlock."

Wedlock, nor born within within a Competent time afterwards." That would include the Child I mentioned for there they were not married at the time of Conception and the Husband died before Birth. - This Child was not begotten nor born in lawful wedlock, and yet he is considered legitimate, and yet he might come under the definition of illegitimate.

Previously indeed no other proof of illegitimacy was admitted where the Child was born during lawful wedlock but such as rendered legitimacy absolutely impossible. It must be proved in one of two ways viz, 1st either by proving the impossibility of coitus, 2^d or second by physical impotency.

As to the mode of proving Non-access the only mode under the Statute was the ab-sence of the Husband, extra quatuor menses from the time of Conception to the birth. It is generally considered legitimate if they were both in the Realm. So if the Wife was confined in a Dungeon for 10 yrs still it was considered legitimate.

Now the consequence of this rule was that if a Husband was absent he could not be dead, for any length of time, and so ^{1st Part 344^{as}} ^{2nd Part 344^{as}} ^{3rd Part 122} ^{4th Part 122} ^{5th Part 122} ^{6th Part 122} ^{7th Part 122} ^{8th Part 122} ^{9th Part 122} ^{10th Part 122} ^{11th Part 122} ^{12th Part 122} ^{13th Part 122} ^{14th Part 122} ^{15th Part 122} ^{16th Part 122} ^{17th Part 122} ^{18th Part 122} ^{19th Part 122} ^{20th Part 122} ^{21st Part 122} ^{22nd Part 122} ^{23rd Part 122} ^{24th Part 122} ^{25th Part 122} ^{26th Part 122} ^{27th Part 122} ^{28th Part 122} ^{29th Part 122} ^{30th Part 122} ^{31st Part 122} ^{32nd Part 122} ^{33rd Part 122} ^{34th Part 122} ^{35th Part 122} ^{36th Part 122} ^{37th Part 122} ^{38th Part 122} ^{39th Part 122} ^{40th Part 122} ^{41st Part 122} ^{42nd Part 122} ^{43rd Part 122} ^{44th Part 122} ^{45th Part 122} ^{46th Part 122} ^{47th Part 122} ^{48th Part 122} ^{49th Part 122} ^{50th Part 122} ^{51st Part 122} ^{52nd Part 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Cooper 484 with any other person is admissible. So also
Q^a - 594 proof that the Child is related or goes by the
45th Sep 305 name of another person. Or if the mother pro-
ved as the Wf of the third person is admissible

Now you will perceive upon Enslaving,
all the rules that I have laid down that there
is no practicable revolution. The American Guild
regard that nothing, but absolute physical
impotency, could be admitted, now it does not
assume it to be proved, impotency in any way
to be assumed - Just far as to legitimate African
now as to illegitimate.

The issue of a Marriage null. "ab initio" is illegitimate. So ~~also~~ if after a Child is born the parties are divorced. "a vinculo matrimonii" the Child is illegitimate, for the divorce is always upon some Cause that rendered the Marriage unlawful and null "ab initio." If, but the Marriage was null and void as the parents were divorced for Cause before Married which rendered it unlawful in both these Cases the Issue is illegitimate.

But the legality of a Marriage not ab-
solutely void can never be called in question
except during the lives of the parties. —
This rule is founded on an ecclesiastical precept
the proceeding in the Ecclesiastical Ct was
considered.

and a spiritual one "pro salute animarum"

Upon this rule is founded the maxim, that children can be bastardized after the death of either of the parties, i.e. parents which clearly amounts to this, that the legality of a Marriage can be called in question after the death of either party. This supposes that the Child was born in actual Wedlock, and not where there was no actual Marriage.

A Child begotten and born after the death of a divorced "a mensa et thoro," is presumed to be illegitimate, in point of fact it may be legitimate, and sometimes is, but the presumption is that it is illegitimate, because the Law will suppose the Husband Salk. 123, and Wife, conformable to the sentence of Sepa- & Coke 112 ration, unless they be proved. But if they separate voluntarily, the Offspring shall be held 45 Rep. 330, legitimate, till the contrary be proved. The Law will suppose except unless the negative be proved.

It may be proved legitimate or illegitimate.

When the question as to legitimacy depends on non-accept, the Wife is not permitted to prove that she may be entirely disinterested. This is not founded on the ordinary rules of testimony but on decency and therefore on Policy, — and yet the Wife has been admitted to prove her non-incontinency, from the necessity of the case,

as no other proof could be found, but it is
 otherwise as to now accept, it may be proved
 Cooper 594 in another manner, and therefore the Wife
 B. & D. 112 shall not be permitted after marriage to
 Wilson 340. say that they had no connection.

I would remark by the way that since
 the time of Ed Coke, the Ct have held a
 special regard to decency, and and will never
 burn any thing, "Certe bonos mores." —

Upon such a case the Wife is a good
 Witness to prove the time of the birth, or that
 Cooper 594, and so is the Husband. — either of them.
 as the case may be and admitted to prove
 the birth or the fact of Marriage.

And even the declaration of Parents in
 their life time tho. ask of Ct. as to the Child
 having been born before or after marriage
 may be admitted in evidence after their death,
 because they being dead can't improve it them-
 selves. if the Credit of such declarations are
 impeached it must be left to the Jury to judge
 of this is not battening, the Court. —

And answer in Ct. by either of the parties
 in the former case tending to tell the time
 when the Child was born. As good evidence
 It's also "oral tradition" "Common Reports"

and

an entry in a family Bible, an inscription
on a Tomb-Stone, or a personal being upon
the family mansion house are all evidence of
a Child's birth to ascertain its age. Whenever
its legitimacy depends upon the time it was
born, all these are admitted as evidence.

Case 599.
11.12
B. & N. 233
D. 293
13
Vol 4 page 382

By the Civil and Canon Laws of Rome
a Child born before Marriage, upon a stable-
quack, claiming the parent was legitimated.
But this is not the case in the Law of England
or by our own Law.

12.11.10 324
13.11.10 454
6.11.10 55

The definition of a legitimate
Child requires it to be "born within lawful Wedlock
or in a competent time afterwards" - by that is Crofts, 541
meant that a person to be legitimate, must
have been "born within such a time that within the
usual course of gestation, might be his, but it
is otherwise, if not born within the usual course
of gestation.

13.11.10 450

Now what is the competent time
mentioned in the first the Law does not tell,
indeed the determining of this part belongs to a
other profession. However Mr Hargrave, 1.12.5
in his Notes on Coke's Littleton with the assistance
of Dr Hunted has given us the most certain
rules that there are as to the time, the average
time settled by "Hunted" is -

1.12.5
1.12.5
1.12.5
1.12.5
1.12.5

Now according to some opinions at 9

solad.

9 Solar Months and 10 days (at 30 days) it would be legitimate. But averaging the Month it would be 28 Days: the old Books say, 280 days, or 40 Weeks.

Questions of this sort frequently occur in our cases of Prosecution for Bastardy. - See Palmer 9. the rule is that a Child born in the usual Course of gestation, is legitimate, but this may be rebutted.

See the other head a Child not born in the usual Course of gestation, is presumed illegitimate, but this may also be rebutted, but it is so born a great length of time after the usual Course it cannot be rebutted.

Thus it has been determined, that a Child born in 9 Calendar Months and 10 Days, and Est. Dig. 988, another in 9 Calendar Months and 30 Days, was legitimate under special Circumstances.

There is a rule in our Books, tho, it is one which will scarce ever occur, that if a Woman after the death of her first Husband, marries another immediately and the Child is afterwards born in such time that by the Course of Nature it may be either by the one Husband or the other - & where the Father is doubtful the Child may, on availing, at full age choose which of them he pleases for his Father. - in this Case he is said to be more than ordinarily, legitimate. !!

It is also a rule that a woman who proved
to be illegitimate, can't be bastardized after
her own death: - but this holds only as to
her own illegitimate child born before the
intermarriage of its parents and the illegi-
mate issue of a married couple.

4 Coke 44
1 Inst 33^(a)
D^o in 245
Salk^o 126
3 Levins 410
1 Bro 315
Foster & 500

When a Son is born before the Parents
intermarry, and after marriage they have another
or Son, lawful issue, and upon the death of the
Father the one born previous to the marriage
called in Law a "Bastard squire" enters upon
the Estate, and the younger one born after
marriage called "Mulier puerne", during his
whole life, never disturbs him: he can't after
the death of the "Bastard squire", enter upon his
issue.

1 Inst 244
Plow 634
1 Bro 310

But to exclude the "Mulier",
from the Inheritance there must not only be
an uninterrupted possession of the "Bastard squire",
during his life, but a descent to his issue.

12
See also 10

Shall now consider the relative rights
of Parents and Children. I will now consid-
er the rights and incapacities of Bastard & Son
Illegitimate Children. The rights of an
illegitimate, are such only as he can acquire
he can do nothing by descent or succession.
he is called in the Law "Filius nullius" he
can't inherit from an Ancestor. It is said that
he

he is not of kin to any one except his own
 If such the rule is too broad. the maxim of the
 Law that he is "nullius filius," does not hold as
 5. Mass. 108. to all purposes there are certain other relations,
 De Reg. 88. that he is related - thus he is considered within
 Const. 305. the Stat. prohibiting marriage within the
 Comp. Rep. 2. Degrees of consanguinity and illegitimate cannot marry
 1808 4589 his Mother or his illegitimate Sister. or also
 page 186. illegitimate Daughter cannot marry her Father
 or indeed any near blood relation for this would
 be incest. To these and other purposes
 the Law recognizes the relation between Parents
 and illegitimate Children.

Now is this Gen^d maxim correct in rela-
 tion to those provisions of the Stat. Law, that
 require the Consent of Parents to the Marriage
 of an Infant Marriage. If an illegit-
 15. Rep. 90. imate Infant marry without publication
 of Banns, or without the Consent of his Mother
 or of the Father if the filiation is proved, this
 marriage is not valid.

Indeed the Gen^d maxim that he is "
 filius nullius," applies only, in case of Infidels and
 18. Mass. 188. It is Gen^d laid down by ancient Writers that a
 15. Rep. 101. Bastard is filius nullius. "Because he cannot inherit."
 1808 309. If it seems then that this maxim is found-
 ed on his legal incapacity of inheriting. Thus
 "Littleton" says he is quasi filius nullius be-
 cause he cannot inherit. And in,

And in pursuance of this Maxim an illegitimate Child has no Surname by Antecedence. 1st - B he may acquire one by reputation. But he can't ^{Reynolds 587} acquire one any other way. It is otherwise as to legitimate Children, they take the name of their Parents.

And this Surname acquired by reputation can only be acquired by Continuance of ^{Geo. Ely 510} time, he does not acquire a name by being ^{Reynolds 587} called at his birth the reputed son of "John Stiles." & Case 65. But this reputation must be continued for ^{Reynolds 529} some time before he can be said to acquire the Surname of "John Stiles."

But having acquired a Surname by reputation, he may make a purchase of Land. 1st - B by that name thus acquired. Therefore in ^{Parkinson 20} a purchase or sale made by him whether the 1st M^o 410 description is to A B or to J. S. or to "J. S." at ^{10th Feb. 174} the son of John Stiles, after this reputed name ^{Reynolds 587} the description is good. Thus after he has acquired by reputation the name of "Stiles" in a Deed to "Thomas Stiles son of John Stiles" he may take.

But an illegitimate Child can never take under such a description as this "viz to the issue of J. S." I suppose the reason is that the word issue is synonymous to the word "line of the body" and an illegitimate cannot take.

take as heir to any one. I think this is going too far. The word "Heir" in legal effects is just ⁶ synonymous to "head of the body", it is a word of imitation, and an illegitimate Court take as head of the body. Both as "Heir" and "head of the body", are sometimes used as words of description. I think this rule is too general.

An illegitimate son acquires a surname only by continuance of time. Hence it is said that if a contingent remained to the "eldest born son of John Stiles" - whether legitimate or illegitimate he having none born at the time and he afterwards has one that is illegitimate. ^{See 5th page 324} ^{8 Case. 108} ^{1 Just's 3} ^{Our City, 510} it is said he could take. Because he cannot take as son, for at the time of his birth he has not acquired the name of "Stiles," and it is not known whether he was wife, therefore it is said the contingency is too remote. or in the language of the Law. "potentia remota plene."

It is said however that if such a limitation be made to the eldest unborn son of "Jane Stiles", whether legitimate or illegitimate, and she afterwards has an illegitimate one, it will enure for his benefit, for he acquires the reputation, by being born of "Jane Stiles", there is no uncertainty after his birth.

Both branches of this distinction I can

seem questionable; and it is hard to ascertain whether either of them is Law, as to the first a limitation to the eldest unborn son of S.S. whether legitimate or illegitimate. It cannot take effect - but it is otherwise with a limitation to the eldest unborn son of Jane Siles, whether legitimate or illegitimate, it may take effect.

Now if uncertainty of person be the reason, then undeniably the former cannot take, if that be the only reason, then to be sure he may take a limitation to him through the Mother, as the uncertainty of person does not here exist: it still remains doubtful whether both are not depending upon too remote a condition. But I think there are other reasons. Justice Blackstone says, that the birth itself is too remote, & possibly to support such a limitation. Mr. Hargrave seems it is in dubio, he says he will leave it to the learned reader to rule: - there are a number of authorities on both sides, it must therefore be settled by the greater number of authorities.

That such a Contingency is void on the latter ground. See Goddard 510. 2 Brevs 170. 1 R. W. 529.

I am inclined to think the true rule is that a limitation to the unborn illegitimate Child, whether it be thro' the Father or Mother, is void.

I think the Law of England adverse to any future provision for illegitimate Children etc, I don't think it just or humane, and therefore think such a limitation, cannot be supported, on the principles of the Com Law.

Ans.

An illegitimate Child can have no heirs except
 of his own body, all other heirs must be traced.
 Abms 489, to an Ancestor. An illegitimate has no Ancestor.
 Inst 3, as an ancestor is no person whose Real Estate,
 may descend. He is as to some things, relat-
 ed to his Parents but not so considered as to Inher-
 itance.

Another consequence of the maxim, that
 a Bastard is "Filius nullius," is that his Settle-
 ment is regularly in the Parish where he was
 born. Legitimate Children are settled with their
 Parents. It is otherwise as to illegitimate for
 page 339, they can acquire any derivative Settlements.
 Falk, 429, their derivative Settlements are in the nature of
 Abms. 302, Substantives, the relation is always between Pa-
 D 303, 459, rents and Children. If then the Father of an
 illegitimate lives in the Parish of A, the
 Mother lives in B, and the Child is born in C
 the Parish of C will be the place of Settlement.

And such is also the case the Child for the sake
 of nurture must live with the Mother, in her
 Parish; yet the Parish in which it was born
 must be at the expense of its Support & that
 then the Parish where the mother lives, the duty
 of the Parish is secondary, the Parents in the
 first place must Support it, if able so to do.
 You are not to understand that the Child is to be
 taken away from its Mother, immediately. It remains
 with,

with her mother 7 years etc

But the the rule is Gen^l, that the Child must be supported in the Parish, where it was born. yet there is an exception to this rule, viz^t

If a Child is born in a Parish, and there is any fraud in the Mother, or in the Parish to send it away, the Child will be sent back to the Parish where the Mother's Settlement is; thus when the Overseers of the Poor sent a Woman, just before cited - page 340.
viz, into another Parish to have her Child, the Child is to be supported where she went from, as it was said - 121.
a fraud in the Overseers. So also when she was 12th Nov^r, 1759
granted act, When a Mother goes, "Vagrant, Begging &
has a Child, out of the Parish it shall have a
Settlement with her, because otherwise it would be
giving effect to an act in violation of public Law

The rule that an illegitimate Child cannot inherit from its Parent is the same in Conn^t, as in England, with one exception, We have no Stat^t so has several times been ruled out of Ch^t that 13th Feb^r 1709,
he could take from his Mother. But it has never West 155.
been judicially decided, I take the rule that he page 341
is "Tenu^s nullius" to be, the same except in this
one Particular, that under the Law of Conn^t,
the Settlement of the Mother is of Course the Set-
tlement of the Child: the maxim in other
Shires has been kept up: there has been no Stat^t,
but only a rule of our Court. The only

The duty of Parents towards their Bastard Child
 now requires a Consideration by itself. -- This
 duty, consists chiefly, in their obligations to maintain
 them. Now by the English Law and our own the
 duty is imposed on Parents of illegitimate Children and bound to sup-
 port them. for tho. the relation of Parent & Child is
 not recognized between Parents and illegitimate
 Children as to civil duties, yet as to some natural
 duties it is,

Our Law is the same as to this mat-
 ter as only as the English Law. In Conn., as in
 England the Father and Mother are both bound
 to support the Child. But the mode of enfor-
 cing it is different. We have a Statute that
 makes a provision different from the English
 Law. A single Parent is Considered as a
 single Person, but given to the Mother as well as
 to the Father; it is not merely given to the Father
 or Father. The only remedy given in England
 is to the Parish.

The mode of proceeding
 in Conn. is that the Mother is authorized to make
 Complaint to a Magistrate stating upon oath
 who the Father is: he issues a warrant to have
 the Father apprehended, to take him in person
 the Party complained of is then brou^gt before the
 Magistrate, who acts as a Ct of Enquiry finding,
 or if not, does not find him, guilty or not guilty,
 but merely ascertains whether the Charge is
 supported.

supported that it is reasonable to bind the man over; this is altogether a flat error - Swift 211 ind. and the must bind him strictly. If the Jury say Magistrate find there is Cause to hold him over to trial, he binds him over with sufficient Surety.

And the rule to regulate the discretion of the Magistrate is that he must bind him over, unless the Charge is wholly groundless, which may sometimes happen, as where she has evidently been guilty of lying, or is contradictory in her story, in this case it is his duty to discharge the party, otherwise it is his duty to bind him over to appear at the next County Court. On the former trial the Mother is allowed to testify from the necessity of the case. The original proof of the Magistrate is turned & forthwith proof, the form of the proof is disguised but the object is clear that he will support the Charge.

There formerly was a very great error in the belief of the People of this County, generally, that the Mother should make oath before the Court, but this is a vulgar error; it is not so.

The evidence of the Mother is not conclusive, but it is "prima facie" evidence of the truth, therefore the "burden stands" lies upon him. He may show her general incontinence so that she does not speak the truth, &c. he has the same opportunity of attacking her Character that a Witness has. See, Swift 217

Swift 210. He is not allowed to testify. Our Court having put such a tremendous power in the hands of the Woman, it is an indispensable duty that she being examined upon oath, be put to the discovery of the truth in the time of her travail, in the omission Court be supplied. She must have been uniform and constant in the accusation.

West 107. of the same individual. These are requisites. Swift 209-10. Regarding the right to trial. It often happens that the former of these cannot be had at once. There must then be a supplement that she was afterwards put to the discovery of the truth in the time of her travail.

But the omission of this discovery in the time of travail, does not take away the right to present from the Town. That Town Court compelled her to make a discovery, and should not lose their right thus, her negligence. Day 278. Swift 210. it is otherwise both her such an omission Court be supplied; if she would seek such a remedy, if her own she must do it in time of travail; this distinction is very important between the Case and this Town.

If now tried before the County At the. Deft. is found guilty, the judgment is not that he pay a Sum in Corp. but that he find Surety for the damages adjudged agt. him, and also if required that he find Surety to save the Town.

Found on Spain where such Child is born free
from Charge for its maintenance, and the said
Ch may Commit to Prison: such repeated Father
sentile before Sureties for the same. This July 15th Sep^r 1773
in England is called an act of filiation.

The damages according to our practice are usually estimated by what it would take to Support the Child for 4 years. For the recovery of these damages Execution issues quarterly, which will be for $\frac{1}{4}$ part of the damages. During the term of 4 years, and if the Child dies before the time the Subsequent Executions are Stayed.

If the Defendant should exceed the Damages allowed he is chargeable for the extra: and when any one of the quarterly Executions are to be issued upon application to the Ct they will put this "extra" in. To the Child he made Lecture 11. given at the rising of the Ct to which that party July 5th 1812 is bound to trial. The Cause is to be continued to next Term, and the Ct may order a renewal of his Bond that he may be forthcoming when the Child is born. For this reason that perhaps the Child may never be born. (Broom 458)

It is a rule of the English Law, as well as
of our own that if the attor^y do marry S. 110
I prove obetio. that the party bound should
be discharged.

By the Magny, and taken by the
Magistrate.

Magistrate, the party is to appear at the Op
 May 20^y to which he is bound, and shall there answer
 final judgment in the Cause.

We have a Stat^e of Emittations, that no
 Proceedings can be had ag^t a Bail after
 one year, but this does not apply, to this Case
 as the last part of the damages is not to be
 paid, for 4 years, if the Bail were to be dis-
 charged, in one year, the Party would then lose
 $\frac{3}{4}$ of the Sum allowed. But the Stat^e of
 Emittations is to be thus understood in this Case
 that it binds him for one year from the time
 the last quarterly Payment becomes due.

If the Mother does not consent, the Se-
 lect men of the Town may proceed in their
 own behalf. The order in both Cases is that the
 Father give Security to save the Town harmless,
 The Town recovers merely for indemnity, to save
 themselves harmless, and if the Mother after Com-
 mencing a Suit fails to produce it, the Select
 men of the Town may proceed on the Suit, this
 Provision is to prevent Collusion between the
 Father and Mother. He who takes Father do
 not find Security for the quarterly Payment, and
 if required give Security to the Town to save them
 harmless, he is committed to Prison, as a Crimi-
 nal. It is a rule of Evidence in Pro-
 ceedings of this kind that what the Mother has
 sworn

I was before the Magistrate is good evidence
after her death. It may happen that she may 55th Feb 373
die before final judgment. This rule of Evidence
is the same in England.

It has been made a question in Court
whether in a prosecution by the Select men the
Mother is bound to testify as to the Father is?
It has been said that she could not be forced to Day 278
tell as it would show her own Crime; but that ^{Case not Law}
is not so; her Crime is already known. It is re-18th Feb 211+2
solved, and has been determined that upon Com-
plaint of the Select men she is Compellable to
say who the Father is.

It has also been made a question whether
or the Mother in a prosecution by herself is Com-
pellable to answer questions to show her own
innocency? It has been determined that
she must. She is the Prosecution and she is the
Witness to criminate kind, and if she has volun-
teered she must answer the questions put to her.

The trial in Court originally was and still
is by the Ct and not by the jury. I think he
would be entitled to a jury if he would claim
it. But the issue joined is universally tried by
the Ct.

It has also been determined that
Depositions in writing are admissible in trials
of this kind. who the Prosecutor is Criminal, 18th Feb 211
It has -

it has been thus settled. that tho, the proceeding
is in form Criminal; yet its object is Civil.

And yet the proceeding is so far a Criminal
one. that it comes within our Statute that
forbids an appeal, this is an anomalous case

Our Ct have established that for the
sake of admitting Depositions, the proceeding is
to be considered Civil. (for according to their
practised Depositions in writing, can be admit-
ted in no other but a Civil Case.) but for the
sake of forbidding an appeal the proceeding is
to be considered Criminal.

The reciprocal Rights and Duties of Parents and legitimate Children.

The duties of Parents towards legitimate
Children. Consists in three Particulars "viz"
1st Maintenance, 2nd Protection, and 3rd Education

The duty of Maintenance is said to be found
in Natural Law, and this consists chiefly in
providing the Children with Necessaries.

The obligation of Parents to support their
infant Children, when they are able is absolute
and unconditional. It does not depend upon
whether the Infant is Capable of supporting
himself as a matter of fact, for an Infant in
Judgt. of Law is never able to support himself

This

This duty is enforced in England by Stat 43^d of 1386 1489.
Elizabeth. and in Conn^t by a Stat of our own. It Conn 282

And this obligation extends as well to Grand-
Parents as Parents. It is not indeed so absolutely,
unconditional in Grand Parents as Parents, but 1386 4489
in Cases of necessity it is binding. And in neither 1386 264
Case does this duty cease with the Infancy of the Child 190.
Child. for by both Stat^s any Child and that are
poor or impotent or are unable thro want
of understanding, Age or infirmity, to support
themselves, shall be supported by their Parents
and Grand Parents, if of ability. Our Stat^t
seems to have been transcribed from the 43^d of
Elizabeth.

But Parents and Grand Parents are
not bound to support their adult Children or
Grand Children, if they are able by labour or
other means to support themselves: if they are
not able to support themselves, the duty re-
mains. And Infants is always supposed in Rom⁵ 4419
Law unable to support himself. But as to page 286, 312
an adult, the question is always asked: is he
able to support himself?

And upon the other hand the same obli-
gations rest upon the Children and Grand-
Children, to support their Parents and Grand-
Parents, when they are unable to support themselves

and the Children or Grand-Children are able to
 St Comm 232 support them. If then a Parent or Grand-
 Swift 2005 Parent are unable to support themselves, and the
 Children in the first place, or the Grand Children
 in the second, are able, they are bound to fur-
 nish them with necessities.

In England also under the 43^d of Eliz^a
 both Children are to support their Parents as
 in Comm^o, but as Grand Parents are not men-
 tioned, the duty does not seem to be considered
 reciprocal: the better opinion is that they are
 not bound to support their Grand Parents.

There are two Stat^s in England, one makes it
 the duty of Parents to support their Children and
 Children to support their Parents, where either
 of them are Paupers and the other Party is of
 sufficient ability. The other makes it the
 Aug^r 190 duty of Grand Parents, in case of the inability
 B Balst 348 of the Parents to support their Grand Children
 Siles 283, when they are Paupers, and says nothing about
 R Brown 454 the Grand Children supporting their Grand Parents.
 It seems then that this obligation on the part
 of the Grand Children is not binding, they are not
 bound to support their Grand Parents.

It will be discovered from the facts now
 laid down that the obligation of Towns in Comm^o
 and of Parishes in England, to support them.
 Paupers.

Widowers is only Secondary, the primary one is
 on Parents, and Grand Parents, and Children and
 Grand Children if they are able. But if there be
 no such relations, as by Law are bound by Sup. St. Cons 343
 to support them, or if the heads of such families who are ^{De} - 242
 unable to support them, the Parish or Town
 must support them; in no case is the ^{Widow} public
 charged, but where the Widowers have no relations
 able to support them.

But the Grand Parents and Parents are to
 support their Widowers, Grand Children and Children
 yet the Parents are first bound, there is no ob-
 ligation on Grand Parents to support their ^{Widow} -
 or Grand Children, till the Parents are unable
 And so on the other hand Children are to support
 their Parents in the first place if able, if not
 able then the Grand Children. The next time a
 law is bound in the first place.

If a man marry a Woman that has Children
 born by a former Husband it is an opinion in
 Cons. that these Children being minors are to
 be supported by the Step-father, and he is entitled
 to their services, as long as he supports them, i.e.
 while minors. But I think this is not Law. 2 Co. Rep. 1454
 altho, it would be humane. - As the rule in 25 Rep. 119.
 England without any qualification that the 36. Rep. 1
 second Husband is not bound to support his ^{Widow} 190
 Wife's Children, by a former Husband - Quare ^{De} - 953.
 it

Eth. 150. Because it is said the obligation holds only with-
 regard to Conduct quintess. And I doubt whether
 the English rule so absolute is established on a
 sound principle. It is established without qual-
 ification. I apprehend the true rule and principle
 to be this, that if the Mother at the time of the
 marriage, is capable of supporting the Children
 then upon the Marriage the Husband is bound
 to do the same. It is necessary that some
 person ^{should} must support them, and as she cannot
 support them after marrying him he must do
 it, for the maxim of the Law is that upon mar-
 riage the Husband succeeds the Wife "Cum onere"
 with all her duties and obligations. It seems
 to me singular, and really unreasonable, that
 the Mother when her natural duties bind her
 to do it, she is discharged, and that by her
 act alone she can cast off so important an ob-
 ligation. If she is not capable I think that
 she is ^{not} bound, and therefore think that the rule as
 laid down in England is not sufficiently qualified,

The rule is well settled that a man is not
 bound to support his Wife & a single Parent, tho'
 relation between them and Child is only that of
 affinity. When he marries he knows nearly
 what it will bind to support the Children, and
 the burden is constantly growing lighter.

B. B.

But he does not calculate on supporting the Parents, they only become Paupers at an advanced age, and the burden of supporting them *supra* is constantly growing heavier. And if he were bound to support them it might possibly *page 107* lead to domestic disturbances, and tend to destroy their tranquility.

It is also argued that a man is not bound to support his Sons Wife after a Divorce "a mensa & thoro," which seems to imply that he must support her if not divorced, this seems to be just that he must support the Sons Wife *Sty^d 955* for he is bound to support the Son, if he is unable to support himself and the Son and his Wife cannot or ought not to be separated.

There is a supposed case that I find no rule laid down to enable us to decide who must be at the expense of support it is this. Whether a Pauper must be supported by the Parent or the Child? - it is doubtful which of them must do so. It seems to me that both of them must contribute equally. The Stat makes no priority where the relations are in equal degree. I find no case on the point.

It is to be observed that this duty of the Father to support his Child does not extend to deny a Parent the privilege of disinheriting his Child

Hc

How may perfectly disinherited whom he pleases
 while he is living he must support his Infants
 Children if he is able. But it is otherwise as to
 disinheriting them. He certainly may dispose of
 all his Estate as he pleases

There is little danger of this rule for a Parent
 upon his death bed would scarcely disinherit a
 Child without good reasons. and it is impossible
 to take this power away from a Parent to leave
 his Property by Will to whom he pleases without
 creating some very principal of Law upon the Subject

We had one Particular Stat^e providing that
 if a man die without Issue leaving a Widow
 who is unable to support herself and has no re-
 lations bound by Law to support her. Her Collateral
 relations are bound to support her. (The Estate in
 their names is bound for her support)

The mode of enforcing this duty of Parents and Child
 are reciprocally is well settled in England as
 well as in Conn.

But there is a difference be-
 tween Infant and Adult Children, in the
 manner of supporting them. In Conn^t the
 mode is established by a Stat^e of our own.
 If marriages are entered to a minor Child (ac-
 cording to the rule before laid down) an action lies
 agt the Father for the value

Exh^{ibit} 1
 D^o 31
 D^o 281
 D^o —
 3 Day Case
 Stanton
 Willard
 Page 219

But where the wages are to support on itself
 Pauper. It is done by application in the form
 of a petition to the County Ct where the party poor - 50
 lives. It cannot be supported at Com Law. The 2^d - 168
 expenses could not be distributed. It must be done
 in the form of a petition, and the Ct require
 their discretion and act as Ct.

This application may be made by any of
 the relations mentioned in the Stat. Parents, St. Cons 383
 or Grand Parents. Children or Grand Children or by
 the Select men of the town to which the pauper
 belongs.

On this memorial all the parties
 who are bound are brought before the Ct and the
 expense is apportioned among them according
 to their respective abilities, or means, as enqui-
 ry is made as to what they got out of the estate
 originally. And finally the ultimate proceed-
 ing is for the Ct after ascertaining their pro-
 portions to take laid from each. is security
 that they will abide by and perform the sen-
 tence, and if he not complied with Ex. - issues
 generally.

Lecture 12th

I come now to consider the second
 head "New Protection." The duty of protecting
 children is founded on Natural Law. But this
 duty tho' permitted even hardly be said to be
 enjoined or enforced by any municipal Law.

A

A Father can be compelled to provide or
 defend his Child from outrage & from the nature
 of the Case. But a protection by the Parent
 is permitted by the Municipal Law - thus a
 Parent is permitted to assault a Child in a Law
 Suit without incurring the guilt of maintenance.

Maintenance is an offence ag^t public
 justice, encouraging Suits, and animosities, by
 helping to bear the expenses of them. And this
 permission between Parent and Child is recip-
 rocal, as a Parent may maintain a Child in
 a Law Suit so "vice versa".

A Parent may, also justify an Assault
 and Battery, in defence of the Person of his
 Child, and so "vice versa".

But as the Law rather permits than enjoins
 this protection, there are very few cases in the
 Books, to be found on this Subject.

3^d In the third place, Parents are bound to
 give their Children a suitable Education, and
 this is said to be and doubtless is a natural duty.

There is no provision in England to enforce
 this duty, except that poor Children when past
 the age of seven, are taken out of the hands
 of their Parents by the Stat^e for apprenticing
 poor Children, and are placed out in such a
 manner as may render their abilities in their
 several

Several Statutes of the greatest advantage to the Commonwealth, and that a Child is not to be sent beyond the Seas, either to prevent its good education in England or to enter into any popish College, or to be instructed, persuaded or strengthened in the popish Religion.

These are all the most binding on the Parents by Common Law, in the nature of the Case as one that is hard to enforce by any municipal Regulation; and as it is safely left to the feelings and impulse of Nature, it is very seldom that Parents will not educate their Children in any Civilized Country; there is no great necessity imposed, and here in England the Common Law does not enforce it, as the two Statutes I have mentioned.

So soon as the Statute goes further, it prescribes that all Parents and Masters of Children should by themselves or others teach and instruct or cause to be taught and instructed all such Children as are under their Care, and Government Section 1 according to their abilities to read the English tongue well, and to know the Laws against Capital Offences, and if unable to do so much, at least to learn them some short orthodox Catechism, without books. So as to be able to answer such questions as shall be propounded to them out of such Catechism. Now 'queri', what sort of Catechism is this, the only answer will be,

the Ground for this, was "that the Meaning of this Law, meant, to do this duty."

There is one provision more important viz, that if the Select men of the Town should find the Parents or Masters neglectful of their duty in the aforementioned Particulars, to wit, by such Child overgrown, truant, stubborn, and unruly, they shall take such Child, and apprentice him to some Master Male, not under 21 years of age, and Females to 18 to be suitably instructed, employed, and governed, these are all the provisions in the Law.

The duties of Children to their Parents, consist in obeying them and being Subject to them in Infancy, to Support them if of ability, when they become Parents and Protect them when necessary, the last Protection is merely permitted, not required.

I have to say thus far Concerning the Relative duties of Parents and Children. I now now to consider the Rights and Powers of Parents over their Children.

And Infant is Subject by Law to the Personal Control of his Parents, as the duty of the Parent is to maintain, and educate his Child, so he must have a right to enforce that duty. Hence the right is founded upon this duty. And we may lawfully

Correct his Child in a reasonable manner 1488m. 457
 for breach of duty when under age 17 Hawk. 130

But the Court Law of England allows a Parent only to correct a Child in a reasonable manner. He compels his obedience and so his duty, this is for the benefit of his Education. But if the Parent greatly abuses the Child or the Correction is outrageous, and stems from malicious motives, the Child may have a redress of Assault and Battery against him by his ^{own} Child's attorney. I don't know of an instance in which this has been done but as a matter of course from the preceding rules a Child may have this action.

But the authority of the Parent being of course discretionary in Correction, he is not liable for every slight offence, exceeding the precise limits prescribed in the rule. That might destroy family Government. For the liability of the Parent he must have been guilty of atrocious conduct, a great transgression of the rule, and a bad motive.

How far a Father is liable in the event of killing his Child, in correcting him & so forth 17 Hawk. 134
 not acted upon at this time. But refer you to ^{Hawking 135.}
 Criminal Law. I will barely observe as a General principle that if a Father kills a Child it may come under any of the three classes of Homicide, according to the circumstances of the case.

This power of Coverture in the Parent may be delegated by him to a Master, but the Master can't delegate it to another. The Master is *Reynolds 1153*. then "in loco Parentis" and may like him correct and restrain him, but he can't delegate his power. So he who has an authority delegated to him can never transfer it to a third person.

The Consent of a Parent to the marriage of his Infants is required by the Law of England *18 Com 1182* and our Law. A Parent by both these Laws may Consent and prevent the marriage and therefore a marriage without Consent of Parents is void (by the Law of England).

By our Law in Cases of Marriage is good without Consent of Parents &c. but the *Mons 47*. Clergyman or Magistrate who solemnizes the Marriage incurs a severe fine.

A Father has no other Power over the Estate of his Infant Son, than as his Trustee, or Guardian, and in this Case he is liable to account with him when he arrives at full age or before at the Case may be. The Father then has no interest in an Infants Estate, any more than a third person has. His Trustee or Guardian, he may manage his Estate, and as such is bound to do it.

But the,

But tho. he may ruin the ^{parent} & during
the Childs minority. yet he must account for ^{them} when he comes of age — 18 Moins 1452.3

And a Minors Child is entitled to all the
property he acquires otherwise than by his labour
or personal service. Thus if property were
given to an Infant it is as perfectly his as if
he were an Adult, and the rule is the same
if a Devise or Legacy is left to him, 18 Moins 453

But as the other ^{parent} the Father is entitled to 18 Moins 260.
the Childs labour, or whatever he may acquire page 379.
by labour. because the Child is the servant of the
Father, and if the Child earn wages with or
without the consent of the Father, the Father
may compel the employer to pay the amount
to him.

And from this right of the Father
to the avails of the Child follows the doctrine that
the Father is entitled to an action of "per quod
servitium amisit" agt any one that has lead
or otherwise injured an Infant Child so as to an-
nihilate his service. But I want to have premised 9 Co. 113
that this action does not arise out of the relea- 18 Moins 153
tion of Parent and Child out of Master & Servant, Exp. Dig. 545.

as the action is for service or labour which
ceases at the instant the time the Child is liberated
from the Parents service. — And upon this prin-
ciple the Father may maintain an action agt ^{any} 18 Moins 233.
any one who carries away a Minor Child from his pa-
rents house & his service.

And here I would observe that if an Infant is injured in his person, is ruined, & Corporal Hurt, the action is to be brought by himself, but the consequential damages by the loss of service are to be recovered in an action brought by the Father. The parents may sue in a "per quod servitium amittit"

And if in a case of a personal injury done to a minor Child, the Parent has incurred any actual expense, as for instance the curing of a wound &c. he may recover that expense in this action, if he lays it in his declaration as a special ground of damages.

And upon the same principles a Parent may maintain an action against any one who has seduced his minor female, and gotten her with Child. Originally it seems the loss of service was ^{considered} the only ground of action. And now it is the principal ground of action, at least the nominal one. Though it has been said, & it is to be believed the action cannot be maintained, without allegation of loss of service. I have never known an action maintained without it. If this is not the ground of action why may not the Father maintain an action against any one who has seduced his Child of 50 years of age, and who perhaps has not lived with him for 30 years. or why may not a Brother or Sister maintain the

Bohoy, 1032

Febr. 1879

Bohoy, 1031

Bohoy, 873

Bohoy, 769-70

the action, & on Child and maternal in the action 1237,
where Child Mother has been Seduced, and gotten 2000 \$20,
with Child? I believe the old rule is therefore
correct.

And in this action as in the former
one of Assault & Battery, any expense of the Parent ^{Friday 22d 9.}
may incur during the illness of the Daughter. 3 W. 180
may be recovered if it be specially laid as the
ground of damages.

But tho the cost of law
is indeed the gift of the action, it is by no
means the principal ground of the damages.
The sum recovered may be enormous, and yet
the Corporal hurt may be but trifling, it may
not be 5 Cents or perhaps one Cent cost. The
aggravated circumstances attending the case are
what may be considered the cause of the damages.

There is no inconsistency in this rule, the rule 3 W. 19
is in other cases the same, as supposed one should
spit in another's face, or a man should bring
another's nose, the jury would give great damage. ^{Exp. Dig. 646}
If the the Corporal injuries are paid and in
a measure nothing, it is the insult offered. ^{2nd ed. Dig. page 67:58}
I think the action is founded on the right ground
and that this is not an enormous case.

I presumed then in the proposition that this
is not the ground of damages, the expense be,
upon the family and the injury done to the female
herself.

herself are the great grounds of damage. Thus, the ground of action is nominal. It is not accepted
 13 Rep. 108 that the damage should be on amount of the
 3 W. 19 loss of labour. Where an action was brought for seducing a Daughter 23 years old. it was alleged she was not a minor

Now it is perfectly clear that an action will lie for seducing a Minor Child. who never was of any service to the Father. A Daughter of a Peer of England. is not supposed to do any work for her Father. on the contrary in a pecuniary way
 13 Rep. 108 she is an expense and not a benefit. In an Action there must be actual service. if it should be won to nothing, as to whether Father's Credit Costs one or more. But it need not be alleged that a minor Child is of service.

Again that loss of service is not the principal ground of damages. is evident from this. the "quantity" of the damages is in a great measure determined. from the Character of the
 13 Rep. 108 Daughter: if her Character for Chastity was bad. the injury done to the Family is less: if she can be proved to have been very profligate the Father can only recover nominal damages. and if it can be proved that she had consorted with others it will mitigate the damages.

So also where the mischief has happened thus.

the indiscreet conduct of the Father himself he can
 in good reason take nominal damages, and as the
 case may be more or less. It sometimes is so bad (Ms. Rep. 341
 to the action. Thus where a Father, encouraged in
 acquaintance with his known as impudent, and
 would tend to the seduction of his Daughter, he
 can recover. For in this case the Father is con-
 sidered as the culpable object of the Family's
 disgrace.

So, in an action of Quia Con' the
 Master has conduct will diminish or destroy (Ms. Rep. 39
 the ground of damages.

I have observed that where the Female is
 a minor Child, it need not be proved that she
 actually served her Parent. It is sufficient that she (Ms. Rep. 53
 lived in the Family, this is laid down by Lord D^o - 233,
 Henson without limiting it to minors only.
 What I take this rule stands down in "Hake"
 to be confined to where the Child is a Minor,

This is not the case with an Adult, it is es-
 sentially necessary to prove some actual ser-
 vice or conduct of service so that she may be (3 Burr 1878
 controlled by the Father. When a minor Child
 comes of age she is liberated from the Father -
 but if she continues in the capacity of a servant
 the Father still has the control over her.

The age of the Daughter is not material.
 ip.

38 Wilm. 18

25 Sep. 1887

if she has acted as Servant to the Parents. Hence
an action has been maintained for one who
was 23 years of age and another who was 30 years old.

If then the Daughter is under age she is
considered as Servant to her Father unless she does
some one else either without wages or wages
to be paid by herself. If she does another
she is not under the Control of her Father.

If without wages he loses nothing, and so if.
The results are the same. The person whom she
serves and from whom she receives wages may
maintain an action. That is a rule in
Espinasse's Digest Page 545. that to maintain
this action the Daughter must be resident in
the Father's house at the time of the injury done
and he cites the 3 Burr. 1878. But this does not
support it. I take the rule not to be law.

And again Espinasse in the same page
states that Lord Mansfield held that the Daugh-
ter must be a minor. It is astonishing to me
how any man could make two such blunders
in the same case: neither Lord Mansfield nor any
other Judge in England held any such thing.
The case in the 3 Burr. 1878. gives no ground
or foundation for either of these assertions of
Espinasse.

25 Sep. 4

But this action does not lie
for a Parent suing out any one in loco Parentis
as the Master of a Female Servant. &c. And.

And it was held that where a Female Child - (Ph. Rep. 55)
lives with an Aunt, she could maintain an
action of this kind as she was "in loco Parentis"

Now in an action of this kind the Daughter
is a Competent Witness. The action is brought
by the Father for loss of service. She has no interest 3 Willm. 18
est in the event of the Suit therefore she is a
Competent Witness

I do not know how it happens
that in England the form of the action in this case
has always been Trespass, and not Trespass on
the Case. I cannot consider how this came;
if a man beats my servant so that there is a 3 Willm. 18
battery committed, the the servant is entitled to an 3 Burr. 1878
action for the personal hurt, my remedy is an 25 Rep. 4
taining Trespass on the Case; now the action of 25 Rep. 253
Trespass on the Case is lost, where there is no D. - 240.
force, or where the damages are consequential. 2 And. Rep. 470
but "Trespass" creeps in this case has always
been true for force. I think the Father's action
is Trespass on the Case, i.e., in principle. I
found in Boscawen & Puller (i.e. And. Rep.)
a very late opinion, which of whom I should be
too, I am happy to observe that it supports my
opinion. And Mr Justice Buller says nearly
the same thing.

But when the D. has illegally entered
the

16 And. Rep. 107
18 And. Rep. 481
7 pages 9. 13
5 And. 338,
2 And. Rep. 482

the D^{ff} has an, and done this injury I have mentioned.
 B^{oy} 1032 the D^{ff} may sue him in Trespass and lay the
 Sth 205. particular injury, i. e. the 1st which he has an agree-
 D^r - 642. notion of the former, or as ground of consequential
 damages, and recover in full. This I lay down
 as a rule that is proper, it is founded on principle.

The established practice in England is to bring
 Trespass in such cases. I observed that I could
 not tell how the action could be Trespass in the
 former case, because there is no trespass. —
 Where there was actual violence committed, this
 certainly was the form of action and as this was
 the form which he entered the house without li-
 cence the form was continued. I suppose when
 he was licensed. Tho, a bad servant was killed,
 the action might be Trespass on the Case, yet
 even had the beating of the servant is merely the
 inducement to the E^g, or loss of service.

Where the D^{ff} sues for Trespass, in unlawful
 by breaking and entering the house, and lays
 the subsequent injury as an aggravation of it
 and the D^{ff} proves that he had permission to
 enter this will defeat the action. Trespass for
 house-breaking will not lie. Licensed to enter
 will be a bar to the action if pleaded, but Case
 he gives in evidence under the Gen^d Issue.

If for example the D^{ff} enters the D^{ff} house
 and beats his servant, and he brings an action.
 For,

tho, it seems to me extraordinary, how it can be
 made a question, whether a Father will lie
 for taking away an Infant Child from the
 Father there being no loss of Service alleged.
 I really think this is a subject on which
 the artificial rules of Law can never doubt,
 it certainly will lie. If the Father has a
 right to Command his Child to do his duty, and
 to have the Custody of him, he certainly has a
 right to a remedy, all Considerations Concur to
 give a remedy, Good Humour, Duty &c.
 Now in England it was never doubted that an Ad-
 vocate would lie for taking away the Heir ap-
 parent, but whether it would lie for one of the
 younger Children was doubted, they formerly
 had a writ for taking away the Son and Heir
 Apparent at Hereshe's request. I think the
 action will lie without alleging loss of Service
 it cannot be doubted for a moment,

The authority of the 7th Statute Cases when
 the Child attains the age of 21 years, which is the
 point of full age both here and in England for
 they then are enfranchised by arriving at years
 of discretion.

It is said in Books of Court Law,
 that the Master as such has no power over his
 Child but this must be when the Heir and is
 living, it is not intended to embrace the Case of
 a W. Doe, who certainly has a personal Contro-
 over

over her Children. And a Mother may govern her Children while her Husband is living, but I suppose the theory of the Law would say it was with the permission of her Husband, This rule amounts to very little; for in the first place it cannot hold where the Husband is dead: and in the second place she is allowed to do what she thinks might do. but she does it as is supposed by the permission of her Husband.

Now this rule taken with the qualifications I have annexed to it is a very proper one: the rule merely gives the Father Paramount authority which is necessary in a family. the Mother may Command but the Father may countermand. — there could be no such thing as a Republican Government in a family. it must be a Monarchy, it is not improper for this reason. for in case of a division in sentiment one must yield, and the Husband must have the Paramount authority.

I have read three rules to lay down showing how far a Parent is liable for the acts of his minor Children. —

1st A Father is liable for Torts committed by his minor Children in the same manner that a Master is liable for the Torts of his Servants. — (as to Torts committed by Servants) for minor Children and his Servants. he is —

2nd He is no otherwise liable in them, Contract,

Contract. And a Master is liable for his
Servant except in the case of Contracts they make
for themselves. (this is Conn. Law) how far this is li-
able for Negligence see the former part of this
Bill. The exception as to Negligence is that
he is bound to send them newspapers as Parent
and not as Master; in all other Contracts he
is liable the same as a Master is for his Servant.

There is another exception under our Conn. L.
See Section of Stat. - If a minor Child is allowed to contract
§ Conn. 48th for himself, by permission of his Parent the Parent
is bound by his Child's Contract. this is not found
in Conn. Law but merely in a Stat. of our own,
404

3rd § In Certain Cases under our Stat. Law
the Parent is obliged to pay fines, inflicted on
§ Conn. 228th his Infants Child, (e.g.) for creating the Sublet
D. - 308th for neglecting to do their duty on the highway
D. - 37th for neglecting to do their duty on the highway
King Edward, and for neglect of doing military duty, &c.
375. 515. 580. Father is to pay the Fine, this is always by
Stat. not by Conn. Law.

I now come to consider the Different
kinds of Guardians and their rights and
duties. I do here promise that there is
no bill in the Law in which there is more
confusion in the English Books than this.
Mr. Hargrave in his Notes on Coke's Littleton,
has

has made a pretty Considerable Digest, much
 the best that we have. I shall therefore refer to
 him very frequently. A Guardian, is a
 temporary Parent, or one in the language of the
 Law standing "in loco parentis," during the Child's
 minority. The Child under the Guardians Gov- ¹⁸⁰⁰ § 450
 ernment is called "Ward." In England the Guar-
 dian has the Charge of both the Person, and Es-
 tate of the Ward. But this is to be understood
 with an explanation, - the Person, and Estate,
 of the Ward must be under some Guardian, but
 they may be under different Guardians. Sometimes ¹⁸⁰⁰ § 450,
 the Person is under one and the Estate under an-
 other Guardian.

And here I would observe that the
 manner in which it is laid down in ¹⁸⁰⁰ § 450,
 is apt to mislead a person. He says that the
 Guardian by the English Law performs the of-
 fice both of the Tutor, and Curator, of the Ro-
 man Law, the former of whom had the Charge
 of the maintenance and Education, of the minor,
 the latter the Care of his Fortune, or according
 to the language of the Civ. of Chy. the Tutor was
 the Committee of the Person, and the Curator
 the Committee of the Estate, - as tho, they were
 two distinct Offices, in England yet, frequently, ¹⁸⁰⁰ § 450,
 united in the Civil Law. The English Law
 need not be different from the Civil Law in
 practice,

There are Guardians by Common Law, by Statute, and by Custom. I will then, consider the different kinds of Guardians by Common Law which are 4. - viz.

The first is what is called Guardianship in Chivalry. this is of feudal origin. it arose out of the Norman & tenured. I need not explain it as feudal. § 77. tenures, are abolished in England. Guardianship in Chivalry, is likewise, abolished.

The second, kind is called Guardianship by Nature, he who exercises the Guardianship is called Natural Guardian, the nature of this is greatly, misunderstood, some Books confine it to the Father alone, as if no other person could exercise it. But the Father, Mother, or any other Amutor may at Common Law be Guardian by Nature. § 40 the Father has the first right he may exclude any other. the Mother has the second, and so on the more distant Amutors. If there be two Amutors of equal claim as where the Child is found apparent to both his Grandparents, priority and possessory gives them the right of the Guardianship. There must be some and need but little illustration.

This kind of Guardianship extends to the person only, not to the Estate, (There is a restriction of Abk. rule) and continues till the ward attains the age of 21 years. § 44 Again it extends only to the Heir apparent.

apparent at Com Law, not to the younger Children ^{1 Inst. 88 and 126,}
and it seems doubtful whether it can extend to an ^{36th 38}
third ⁽⁶⁾ presumptive. Guardianship by Nature extends ^{Covent, 300}
only to the person. But I must guard in saying
down rules against misconception. (e.g.) I observed that it
extends only to the person: by this you are not to
understand that Guardianship does not extend to the
Estate; it may lie in the same person. Again when
it is said that the Father can only be Guardian to his
heir apparent, it is not to be understood that he can
be Guardian over his younger Children. For he may be
under another species of Guardianship. — I have
observed in Com that all the Children are heirs, up
to parent, and therefore the Father according to the strict
limitation of the rule is Natural Guardian to them all, ^{1 Inst. 88 at 126.}

The Father in England has ever many ⁸⁹ superseded
all others from being Guardian by appointing a
Testamentary Guardian, under the Stat. 12 of Chas. 2^d

Now for the Powers of the neighbouring States,
without the appointing of Testamentary Guardians
I know not, but we have no such Statute here.

But the, at Com Law the Father or other an-
cutor is said to be Natural Guardian only to the
Heir apparent yet in England he is stated natural
Guardian to all his Children, but here it is not meant
that he is Guardian by Com Law but by the Law of
Nature, as he seems to be the most proper one, so
that should there is none appointed the Chancellor will settle
it on the Father, and in case of his death on the Mother,

Sutton, 14th

The third Species of Guardianship at Common Law is called Guardianship in Socage. Thus like Guardianship in Chivalry, springs from demand, and takes place only where an Infant under the age of 14 years is Seignior of Lands derived by descent, and holden by socage tenure, as other persons is the subject of Guardianship in Socage. —

1 Inst. 87⁽⁴¹⁾D^o 88. m. 13.

2 Mod. 170.

K. B. m. 402.

The right of Guardianship belongs to the nearest kindred of the Infant to whom the Land cannot descend. Thus if he has a half brother of the same Mother, but not of the same Father, and the Land descended from his Father, the half brother may be his Guardian, for the Land cannot possibly descend to him.

Co. l. 1. 98.

D. R. m. 122.

2 B. m. 83.

A Guardian in Socage may rear the Minor Lands, unless he attains the age of 14 yrs. and he may maintain an Action for this in his own name.

1 Inst. 87⁽⁴¹⁾D^o 89.

D. R. m. 13.

Hutton 17.

Pugh 180.

The right of the Guardian extends to the Person to the Socage Estate, to his incorporated hereditaments, and as it seems to his personal property. The reason given for this last is that the Body of the Person draws after it every species of property. But this I suppose that there is no other Guardian paramount to him.

1 Inst. 90.

D^o 88. m. 11.

The trust of the Guardian in this case is not assignable. Now Guardianship in Chivalry was assignable for it was more intended for the benefit —

benefits of the Law than the Infant; But Guar. Statute 293.
 Guardianship in Sarag is particularly for the protec-
 tion of the Ward.

This species of Guardianship de-
 termines when the ward attains the age of 14
 years the Ward may then oust the Guardian *2 Lill. 100*
 for he is presumed to have discretion to choose *2 Bro. 587*
 his own Guardian. The Guardian is bound *1 Bro. 115-2*
 to find the ward when he comes of age, and ac-
 count of all he has transacted on his behalf
 of the profits of the Estate, and must answer
 for all losses by his wilful default or neglect
 but he is allowed a reasonable compensation for
 taking care of it. But this species of
 Guardianship like all others may be superseded - *1 Inst. 89, 113*
 and by the appointment of a testamentary Guar-
 dian, and it ceases of itself at the age of 14.

The fourth and last species of Guardianship
 at Com. Law, is that for Nutrition.

This takes place only where there is no other
 Guardian, it extends to Children who are not
 their parents, - it extends to third persons, and *36 Geo. 88*
 not to their Estates, and ceases like Guardianship *1 Inst. 84*
 in Sarag, when the ward attains the age of 14 *2 Bro. 587*
 years. And this Guardianship can only be ex-
 ercised by the Father or Mother. No other per-
 son can be Guardian for Nutrition. - *2 Inst. 14*

These are the different species of Guardianship known at Com. Law,

There is in England Guardianship by Statute. I have observed before that a Father may appoint testamentary Guardians, to all his Children under the Statute 13 Cha^s 2^d Chap. 24 he may do it either by Will or Deed, attested by 2 Witnesses, whether he is under age or of full age and this appointment he may make for all his Children who are infants, and unmarried, and even for an Infant "in ventre sa mere" - till they attain full age & 21 yrs. or for any shorter period that he pleases. This Species of Guardianship extends to the Person and all the Estate, and one important feature in it is that it supersedes all other Species of G⁻p -

And this like all other Species of G⁻p. except G⁻p in Chancery, is not assignable. A Testamentary Guardian can't assign his G⁻p. for the Father, made the appointment reserving Special Consideration in him.

There is another Species of Guardians under the Statute of Edward but they are now unknown, and there are also Special Guardians by Custom, in England in different places, but they are particular exceptions and don't come under the Gen. Law. I shall therefore pass over them.

There are also certain Species of Guardians not mentioned by ancient writers, which I am now,

now be treated of. (as is known to the Court of England)

The first is by the election of the Infant, this again takes place where there is no Guardian appointed, either by Law or by the Father.

If any appointment of third or other species of Guardian is made the Court extend to Election there may be cases in which none are appointed, and suppose the Infant has no lands held by knights service. here there can be no Guardian in Chivalry, but this species together with knights service is abolished. Suppose he has no lands held by knights service, there can then be no Guardian by Scutage. or if he has lands held by knights service and is above 14 years of age ^{1 Inst. 87th} ^{D^o 89th note 15.} he can have no Guardian by Scutage. And if he is above 14 years of age he can have no Guardian by Chivalry. Or if the Father has not appointed a Testamentary Guardian here there may be a case where he has no other Guardian he then has one by his election —

This species is certainly of modern origin it was first known about the year 1600, the time of the restoration. This election is frequently made by the Infant before a Judge on the Court — The Law prescribes no Particulars, ^{1 Inst. 87th} ^{D^o 89th note 15} ^{Wesley 37th} forms, whether it shall be by Deed or by Parol or how. Lord Baltimore at the age of 14 made his election by Deed. &c.

The age for choosing the Guardian is said in England to be 14 but even this does not seem to be certain, for there are instances of the choice being made before and after that age.

Indeed at the time of the Restoration the choice was usually made before 14. Mr Justice Blackstone says the age is 14 for males and females, But that 89 at 15, Mr George and says they have chosen before 14 and when the spirit of G-70 first came into us they chose it before 14. I conclude there is no age settled, but that the Judge may suffer the choice to be made as he thinks proper.

A second species unknown to the Com. Law is that by appointment of the Ex. Chancellor, this is also of modern date, it seems that the Ct. of Chy. began to exercise this power more than a century ago, as far as I can be learned it was assumed about the time of William 3rd and it has since exercised without any opposition ever since. Indeed in the principles of the Law of England, the King is Guardian of all infants over all the infants in the Kingdom, and exercises it by the Great Seal also, the Ex. Chancellor, and therefore the Chancellor is Guardian of all infants, and has the care of all infants, it is not to be understood that he exercises all the intricate duties of a Guardian, but he has the supervision. (See page 325) New

Gibbon's Hist. of Eng.
p. 290 - 1778
Blackstone's Commentaries
6th - 544

He may be removed for incapacity, whether from Suffering or any other Cause, he may be removed for his private Character being bad, as if he be a Drunkard, or he may be removed for any fault in the management of the Childs Estate, in which he may be removed, by our Court of Probate, for any Cause that in their opinion renders him an improper Person.

If an Infant in Court has no Guardian or Master it is the duty of the Ct of Probate to appoint a Guardian. Where there is a Father there is no need of appointing one, or where there is a Master, and in some Cases the Mother may be.

If the Infant is of the age for Choosing it is the duty of the Ct of Probate to Summon him to appear and Choose a Guardian, but his Choice does not bind the Ct - if there are any serious objections to it: the only effect of this, *St Cond 42* right of the Infant is his right of nominating, *D^o 373*, and the Ct may refuse or appoint,

Under our Court Stat^t, the age for Choosing is 14 in Males and 12 in Females.

If the Infant neglects or refuses to make such Choice the Ct makes a Selection of a Guardian for such Minor according to their discretion, *St Cond 373*.

If a male under the age for Choosing is without a Guardian or without a Father,

wth Father, the Ct may make an appointment
 without summoning the Child but it is not
 usual to do so if the Child they have a Mother, but
 it may be done in Male Infants, as a mat-
 ter of course. Our Ct of Probate in this State
 exercise in some measure the same powers
 as the Ct of Chy in England, The Stat. gives
 them great discretion, they therefore make ap-
 pointments whenever there is occasion.

It has been determined in Conn^t that a Guard-
 ian appointed for an Infant under the age
 for choosing, continues G^d of the Infant,
 Kirby 252, until he attains full age, unless the Infant
 Q^d - 280 after the age for choosing, makes choice of
 Q^d - 287, another, to the satisfaction of the Ct of Probate,
 The choice is rarely a nomination, the Ct
 must appoint,

As required by our Law, that every
 Judge of Probate who appoints a Guardian, take
 from the Guardian a bond for the faithful dis-
 charge of his duty, or trust, and if the Infant
 has property, or duty must be joined with him
 in the bond, but if he has no property, there need
 be no duty, and this bond requires the Guar-
 dian to account with the Ct of Probate on
 or the 1st of Jan when he attains full age, or at
 such other time as the said Ct of Probate at
 on Complaint shall the Court so appoint.

But the

But the Guardian is not liable to be sued by his Ward, to account while the Ward is a Minor except called upon by the Ct. of Probate. - This Stat. 51.2 is that the Guardian may not be sued by a person's Ward. If the Ct. does require it he need not account until the Ward is of full age.

And in England as in Conn. the Guardian is bound to account for the property of the Ward in his hands. 1 Inst. 89.29

And all other Guardians except those in Chivalry are bound to account.

The usual remedy for the Ward to recover agt. his Guardian is by a Bill in Chy. Court for an account. This Bill is more extensive than an action at Com. Law. which may be used. Chs of Chy. have of late assumed the exclusive power of making Guardians account. 1 Inst. 88.29 2 Bac. 679 D^o - 887 1 Bourn 453. The action of account might be as well in England as in Conn. but the usual way is a Bill in Chy.

But it is not uncommon in England for the Ct. of Chy. to make the Guardians account before the Ward attains full age. indeed they frequently do it annually. 1 Bourn 403

In Conn. the usual mode is by an action of account, at Law. it being about as good a remedy as a bill in Chy. in England. If

If the Ward's Estate is in danger from the
 Reg. 137. Guardians' inefficiency, no matter from what
 D^o - 260. Cause it may arise, he may be made to
 2. Mod. 177. account at any time, indeed whenever it is
 2. Bac. 579. signed in a Ct. of Chy in England or a Ct. of
 Probate in Conn, the Ct. may make him a/c

In England if the Guardian is guilty of
 1. 2. Wm. 703 any, misconduct toward the Ward, the Ct. may
 D^o - 700 order him to obtain Security, and in case he
 1. 2. Wm. 403 refuses to give Security, may remove him:
 Salk^r 44. and if there is any reasonable ground to sup-
 Reg. 137, 261. pose misconduct, the Ct. may compel him
 D^o - 1090 to give Security, &c. - The Ex. Chancery
 1. 2. Wm. 442. Power is very discretionary. He makes such
 1. 2. Wm. 180. regulations as he thinks proper.

No Guardian except the Parents of the
 Ward is bound to maintain him at his own
 expense; any Guardian then who is not Parent
 to the Ward, may apply the Ward's Estate to
 maintain him.

But the Parents must
 maintain the Ward if they are able, tho' he
 have abundant property to maintain himself.

But if the Ward has property, and the
 Father is unable to maintain him, he may
 obtain leave from the Ct. of Chy, in England
 or Probate here to apply the Ward's Property
 to his maintenance. He can do this of Course
 { subpage 329, one }
 { to a Ward's } mon.

Now by virtue of this Genl authority, the
 Chancellor makes an appointment when he
 pleases. But he never exercises this authority,
 when the Infant has a proper Guardian appointed.
 This authority of the Chancellor in
 England extends as well to the removal as to
 the appointment of Guardians. if he find, a
 Guardian who is not qualified he may remove
 him, and he may remove a Testamentary Guardian,
 for at the, a Testamentary Guardian excludes
 all others, the Chancellor as Guardian Paramount
 may remove him and appoint another in his
 place. In Common Law the Chancellor has no such
 power.

A third species of Guardianship not
 recognized by the Common Law is that by appoint-
 ment of the Ecclesiastical Cp. Whether this Cp
 has this authority has lately been denied. The
 Law is therefore not fully settled. The Court
 assume the power of appointing a Guardian
 for the Person and for the Personal Estate.

But as to the Person it has always been denied
 in the Courts, and lately denied as to the Personal
Estate. I expect the opinion of the Judges in
 England universally, is that the Ecclesiastical
Cp has no such authority, "ex officio." I presume
 it has no other power but to appoint a Guardian
 "ad litem," which all other Cps have.

1 Inst. 89
 2 Inst. 879
 3 Inst. 44
 4 Inst. 100
 5 Inst. 100

2 Inst. 102
 3 Inst. 879
 4 Inst. 149
 5 Inst. 131
 6 Inst. 132

The last Species known to the Com Law
of England is "Guardian ad Litem" -
A Guardian ad Litem, is a Species one appointed
for a particular Suit when an Infant is
under Debt and has no Gen. Guardian. -
Now as I observed before an Infant-Debt must
always appear by Guardian, and if he has
none appointed said Court could not have one there
appointed as Guardian ad Litem, the Suit
could not go on. The rule is that a Guar-
dian may be appointed in any Ct to attend
to any particular Suit in. Hence a
Guardian may be appointed in Court in our
Sup, or any other Ct even in a Ct of Justice
of the Peace. Now is it observed that this ap-
pointment is where there is no other Guardian.
In England the King may by Letters Patent
appoint a Guardian Genl. to appear in all
Suits, but this is seldom done.

I have now gone thro, the different Guar-
dians known to the Law of England, and I
would here remark that there is a vast deal of
confusion in the Books on account of the
multitude of Guardianships, terminating at dif-
ferent periods, and the appointments being
made for different purposes, &c. It will be
found that there is no incongruity in the
Law.

Every Species -

Every Species has its particular rights, and
 provinces, and upon examination with the rules
 I have laid down, you will find that there is a
 perfect System.

In Conn^d there is no such
 thing as Guardians by Chivalry, by Sacage, and
 no Testamentary Guardians, because we have no
 Stat authority for the appointment of them. We
 have no Customary Guardians, we have none ap-
 pointed by authority of the Chancellors. because
 it is delegated to another Ct., and we have none
 by appointment of the Ecclesiastical, Courts.

The only kind here are Natural Guardians
 Guardians appointed by Probate, and Guardians
 and "a Litem." Guardians for Nurture in
 the Court of Chancery of the term. Each exist
 in Conn^d. and I presume for the same reason
 you can't exist in any other State in the U.S.
 it extends only to those Children who are not heirs
 apparent, and in this Country all the Children
 are heirs apparent, and this Guardianship by
Nurture can exist only where there is no natural
Guardian. But here the Parents are
 Guardians by Nature to all their Children.

Guardianship by Nature, here extends to
 all the minor Children as well to their
 property as to their persons, and continues as in
 England until the Ward arrives at the age
 of 21 years. The right to receive this G^d belongs 1st to the
 Father, & after his death to the Mother.

But in Conn^d this rule of Conn Law is altered, being qualified by Stat^o. On his Death the Mother acts as Guardian of Course but by the determination of our Superior Ct. a third Person may be appointed after the Father's death, as Guardian of the Male Child, saving the Mother's life, without removing her from this, it follows that her right is not abolished.

The Ct limits this right to appoint to Male Children. Had they come to this I know not but they joined the Mother as Guardian of the Female Children of Course till they attain full age. For the Stat^o provides "that when there shall be any minor of age for choosing a Guardian, who hath neither Father Guardian or Master be - here the Stat^o does not mention the Mother, she was not contemplated. Our Ct has said there is a difference between Males and Females, that the Mother is Guardian *de jure* of the Females. Our opinions however go no farther than this, that the Mother is natural Guardian *de jure*, till they attain the age of choosing Guardians for themselves, - not of Male Children. The rule I think is very arbitrary.

But still the Father is alive no other Guardian can be appointed, without the Father is removed, and he can only be removed for Absence & reasons: not as a matter of Course

See page 321. H.C.
See also 1800

Common right - but must always obtain previous permission to do it from the Court, *Realty 387*

In England he must account with the *18th 100*,
 Ct of Chy. if shew he has its previous permission *Nov 203*
 He is safe so here he must account with - *3d 399*
 the Ct of Probate, if shew he has their permission
 He is safe.

But a W^{dow} Having married a second Husband is not bound to support her Children by a former Husband. She may then *page 292*
 apply the Children's Estate to support them, *342-107-8*
 if she had continued a W^{dow}. She could not
 do this.

I expressed a doubt about the former rule. I then said that I was of opinion that the Husband was bound to support the Children, if the Mother at the time of the Marriage was of ability to support them, and, as on the same principle I doubt this.

The Husband has either the absolute property of his Wife or the use of it, and why should he not support them? as she was obliged to do as long as the Property was her own *Realty 268*
 now if this Property would have obliged her previously to the marriage to support them it seems strange that this voluntary act of hers, *See a contrary Rule in 2 Ventr 363*
 should alter this support. But the rule is so settled that neither he nor she is bound, and that she may apply their Estate to them, maintained.

How far a Parent may apply a Child's Estate for anything more than the ordinary expenses of Nurseries and Education is not settled. It has been said that the Parent may be allowed to take the Child's Estate for Nurseries and ordinary Education but Eq. Rules 418. Hardwick denies this. I therefore think the rule is not settled; it is discretionary with the Court. 2 Vent^s 353. 2 Vern^o 137. 255. Guardian. The Ct of Ch^o sometimes allow a Parent to take the Ward's Estate to educate him as they think proper. 3 Atk^s 399. The truth is that the permission is so discretionary with the Ct of Ch^o in England. and Probate here that there can be no certain rule.

On the other hand if the Child is able to bear the expense of an extraordinary Education, and the Father is not dead the Father is not allowed to have it repaid out of the Child's Estate if he give him such an Education.

It is provided by the Stat Law of Con^o that when the interest of an Infant Mortgage is vested by a Ct of Equity to be recovered, so that as to whom it ought to be recovered, the Guardian is empowered to make such recovery. 1 Hen^o 220. and he may be compelled to do it by a writ. If the minor has no Gen^l Guardian appointed the Guardian ad litem is empowered

empowered to do so and may be considered to do
 it as any other Guardian is. In England as before 1794
 I observed before the Infant himself may make a will &c. &c.
 a valid conveyance in such case. Page 228

And by our Stat Law in Conn the Guardian
 of Minors heirs to joint Tenants or Tenants
 in Common, are fully empowered with the as-
 sistance of such persons as the Ct of Probate at Conn 487
 shall for that end appoint to make partition
 or division of the Land with the surviving
 Partners or Tenants as fully as the original Part-
 ners or Tenants could have done

In England this may be done by the In-
 fant themselves according to the will I have page 228
 laid down that where an Infant does a lawful act
 voluntarily which he may be by Law Com-
 pelled to do the act binds him.

And certainly this rule of the Conn Law will
 remain in Conn. as in England where it does
 not interfere with the Stat. It is laid
 down in Robt's Marriages, that the Guardian
 or Protector may bind the Minor by making
 a will for him. I doubt whether this is Law for the Infant is empow-
 ered to do it himself. and where an Infant is al-
 lowed to do a thing himself there is no propri-
 ety in

propriety in saying another way, as it for them.

2 City of L.A.S.
2 Bar 587.
2 City of L.A.S.
in the Infant
Barr in 5149.

A Guardian is never allowed to make an advantageous speculation for his own benefit with the property of the Ward, and this rule has by the the Ward suffers no injury by the speculation. What if the Ward ever had a power or Compromise with the Guardian account as they stand there is actually one, the Infant and not the Guardian is allowed the benefit of this Compromise. To be sure if the Guardian had paid the Debt he would not have been liable or have done wrong but where he does a thing of this kind it certainly is to be considered for the benefit of the Infant. He has no right to make a speculation of this kind for himself.

The Guardian is considered in City as Trustee for the Ward, and upon this it is that a Ct. of City will oblige him to account with the Ward. And it would have been well that if a Stranger notoriously enters upon an Infants Land and takes the profits, he may be compelled to account in City with the Infant as Trustee or Guardian. This is now an account for the Infants inability, he is supposed incapable of acting as an Adult would do, for if a Stranger enters upon the Land of an Adult, the Court sue him in City as an Adult may, but must bring

being Equivocal like The Infant may con-
sider the Stranger as a Trustee or a Fearful
and sue him as a Trustee, if he will but the
other is the better way to consider him a Trust-
ee, or Guardian, and sue him in Chy, for he
may then compel him to make discovery, and
ask of all the profits he has received.

1st. 2. 489
1st. 480
1st. 581
2nd. 295
D. 342
1st. 280

And in this case if the wrong was done
continued for years after the Infant attained
full age, he is bound to account with the
Infant as Guardian not only for what he re-
ceived before he attained full age, but also for
what he received after he attained full age, as
the wrong was commenced when he was an In-
fant, and it is one continued act.

1st. 280
2nd. 587

A Guardian having a Ward's money in
his hands when he accounts with him, must
allow him interest for it unless he proves that
it could not be loaned on interest, which is
difficult to do for Money can only be loaned
on interest, yet it may possibly be that Mon-
ey could not be safely loaned, as in the case of a Child
who is when no person would wish to take it.

1st. 529

And if the Guardian has Money or per-
sonal property in his hands he should apply
it to discharge the Debts of the Ward, and should
not allow them to run on interest.

Now is a Guardian, called to pay a Debt
 10th of 1857. with his own money, and then charge interest on
 2 Compt 231. it if he has the Money or Personal Property of the
 Infant to do it, with. for it would be the same
 thing as if he would not pay the Debt.

And if the Ward Estate is in Mortgage it
 is the Guardians duty, to apply the profits of it
 2d Nov 279. to the Debt, to the extent it is due. but if it
 will more than pay the interest, I should not
 think it ought to be applied of course to reduce
 the principle of the Debt.

The Guardian has no authority to vest his
 Ward money in Land or to realize his personal
 property, but if he does it the Ward on at-
 taining full age may either take the Land or
 18th 485. demand the money, from the Guardian.
 2d Nov 130.

This is no breach of trust in the Guardian
 letting his ward take it at his own will. If
 the Infant takes the money he is bound to re-
 cover the Land and may be compelled to do it.

If in this case the Ward die without ma-
 18th 485. king his election the Ex^r has no election, he can
 2d Nov 485. only take the Money, and must hold the Land
 2 Compt 231. for the election is personal and not trans-
 mitted to his representatives.

The Guardian in accounting with the
 Ward,

Ward is only bound in Genl. to pay the principal and Interest to the Ward. But if the Ward Money was directed by the Father or the Ct. of Ch. to be laid out in a particular way, as to be put in the Public Funds, and the Guardian has applied it in another way, as in an advantageous trade, the Ward on attaining full age may claim the use of the Money, vested in the Public Funds. This rule is on the same principle as the other. I mentioned that the Court should not spend for his own advantage, and the Ward's money. He may spend it as it for the benefit of the Ward, but not for himself. He departs from his instruction at his own risk.

As to the Marriage of Wards, the Lord Chancellor in England exercises a power not known to any of our Cts. because the Chancellor exercises the power as representative of the King. Thus he may forbid a Marriage without Consent of Guardian, and may proceed against a party, and helping it on. He may grant a writ of Habeas Corpus. And if the Guardian gives his Consent to an equal match, and he thinks it unequal, he may disallow it, and give it to the Guardian and all others assisting.

Now you may learn from this that he exercises an authority, not only encroaching upon the Guardian,

Guardians authority, but actually Controlling, him
 And he may exercise any other authority, as
 5 Feb 1858 if there is only one Apprentice of the Ward,
 23 Feb 1858 being wanted to his disengagement - he may
 30 Feb 1858 issue his orders to his Guardians to disallow it
 and remove the person of the Ward Secured.

I can't find any instance where this author-
 ity has been exercised where either of the Parents
 are the Guardians, yet the Chamberlain must
 have this authority, tho. he will exercise it
 in extreme cases. Had sometimes a Parent
 may be a very unfit person for a Guardian
 He is to be a very high authority, but I
 expect it may be exercised.

According to our usage in Cork Roads,
 may be bound out as apprentices by their Guar-
 dians. but I doubt much whether this is a
 binding principle in Law. Whether any Guar-
 dian but a Priest, could do this, the Custom has
 been practised, "Sub Silentio," Whether it
 would be judicially sanctioned, or a question
 raised before Mr. G. I do not know.

A Guardianship of a Female Infant is ter-
 minated by her Marriage. I think that
 this must be where the Husband is an Adult
 tho. I am not certain, for this is our present
opinion I presumed that her Husband being
 a minor

off full age becomes her Guardian, and if he
was not off full age he cannot be Guardian
no more than she was capable of being Guar-
dian over herself: the rule can extend there-
fore as Principled only to those Cases where
the Husband is an Adult. For in the
other Case a Male Guardianship is not so
terminated by this Marriage, as his Property
is not emancipated. His Property is not freed -
Now it would be strange if the Husband
not altogether emancipated. Could he Guar-
dian to his Wife, while she still remains a
Ward. This fortified me in my belief - If
a Male Infant marries an Adult - he Con-
tinues under her Guardian - she cannot be his
Guardian -

26
Section 16

The only remaining division of this Bill,
relates to the Settlement of Infants -

Before I treat of the Law of Settlement
in England, I will consider those regulations
respecting the acquisitions of original Settle-
ment of Persons in their own right, under
the Stat Law of Conn. The acquisition
of Settlements of this kind may be reduced to
three rules.

1st Under our Stat. "no person who"
is not an Inhabitant of this State, or of a
any

any, of the U.S. can gain a legal settle-
ment in any Town in this State, where he
S. Cont 391 may come to reside unless he is admitted by
Section 1st "None of the Inhabitants of such Town, or by
Consent of the Civil authorities, and Select
men of such Town, or unless he should be ap-
pointed to execute some Public Office, this
Office may be Constable, or any thing of the kind.
This rule you will perceive relates to such
as are called Foreigners, not Citizens of the U.S.

2nd "No person who is an Inhabitant of
any of the U.S. (this State excepted) shall gain
a legal Settlement in any Town in this State,
where he may come to reside unless he has
S. Cont 391 some one of the requisites enumerated, in the
Section 2nd preceding rule, or unless he should have been
propertied in his own right in fee of a Real
Estate of the Value of \$334" The real Estate
must be in the Town where he would gain a
Settlement. He has one privilege you will
observe more than a Foreigner that he may
acquire a Settlement by propertizing real Estate
in fee, in the Town to the amount 334 Dollars,

3rd "No inhabitant of any Town in this
State shall gain a legal Settlement in any
other Town, unless he has some one of the
requisites

requir'ds enumerated, in the first rule above mentioned. or unless he shall have been 70 of. *Mass 391* before in his own right in fee. of a Real Estate of the Value of \$100 or has supported himself for the term of 6 years. and paid the same term in the Town. and paid all his Taxes. As to the next Law as to persons coming from one Town to reside in another. and becomes a pauper. is to be supported see the above Cited Statute.

But there are certain other modes of acquiring a Settlement. known to the Law of England as well as our own

1st A Settlement may be acquired by Birth - the place where a Child is first born *Mass 302* known to be is "quinta Facie" its Settlement. *Birth 433* by this is meant that the place of his birth *Comp 304* is presumed to be his Settlement, till another *Salt 488* is shown - thus if he is born in the Parish of *Ex 507* of A in England. or Town of A in Conn. this is "quinta Facie" his Settlement (ie) another is shown.

None ^{of} the places where an illegitimate Child is born is regularly the place of its Settlement. For as the place of the birth is "quinta Facie" - evidenced as follows upon the Principles of the English Law. that the place *page 280* *Salt 427* *Mass 302-3* *De 404* where

where an illegitimate is born is the place of his Settlement.

And if the Child is legitimate, and not
 1. Brown, 306.3 then the Father nor Mother have a Settlement
 Comb. 434, of their own the Child acquires a Settlement
 Comb. 304 where it is born: - this follows from the rule
 2. Ray 507. first laid down. "that the birth is "prima -
"facie" evidence. - but it may be rebutted. -

The first Gen. rule amounts to this viz
 that the presumption of Law is that the
 place of an illegitimate's birth is regularly
 its Settlement. - but this may be rebutted. -
 as where the Mother of the Child sent a Woman
 out of the Parish, and she had a Child - and
 the place of its birth is not its Settlement
 because it was a slave in the overseas: and
 it may again be rebutted, where a Woman
 is apprehended under the Vagrant Law and has
 a Child &c. But the Gen. rule of the
 English Law is that the presumption of an
 illegitimate Child's birth, being the place of
 its Settlement cannot be rebutted. - but with
 respect to a legitimate Child it may be.

1. Brown 303. 2^d A Settlement may be acquired by
 2. Ray 528. Parentage. - being the Settlement of one's
 3. Ray 1473. Father or Mother, the Parent's Settlement is
"prima

"primæ facie," that of the Child. — *Barrett's*
 This mode of acquiring a Settlement obtains *Ch. 371-2*
 in England only as to Legitimate Children, — *13 Com. 403,*
 for this purpose the relation between an ille-
 gitimate Child and its Parents is not recognized
 it cannot inherit.

But as I have already observed in *the 18th, 109*
legitimate may here acquire a Settlement from *Post 155,*
 the same rule. — Settlements of this kind. *page 281.*
 are called "derivative" — because they are not
 acquired by any act of the party himself, they
 are so called in contradistinction to "original" — *35 Rep. 110*
 it is, say *Smith*, for a Settlement acquired by birth
 is "original". —

The Settlement of Legitimate Infants Children
 not emancipated regularly follows that of the Pa-
 rent. So that if the Father having a Settlement *35 Rep. 114*
 with his Child is now pauper acquires a *Id. ~ 118*
 new Settlement is another then last Settlement of *35 Rep. 1*
 his is their Settlement, it is immediately com- *Reg. 1138*
 muniated to all of blood, who are not emancipa- *Id. 831*
 ted, Now Children may be emancipated in various ways — *35 Rep. 279*
Barrett's
Case 49. 84.
Id. 279.

The Settlement of Legitimate Children,
 not emancipated regularly, follows the Settle-
 ment of the Father, and on his death, the
 Mother, so that if the Mother acquires a
 new Settlement after the Father's death it is
 their Settlement, *Barrett's*
Case, 49
Id. 84. 87.
Reg. 748,
Ex. Reg. 1473,

This rule as to a derivative Settlement acquired from the Mother in England has an exception, as I have the married & second Husband the Settlement does not follow her. Because neither
 page 292329. the Husband nor herself are bound to support
 them. From this it follows that this Settlement
 does not follow her, unless the Child be under
 the age of 7 years, till which time they must
 Salk 5287 remain with her for Nuptial, — — — — —

The rule of a derivative Settlement being ac-
 quired first from the Father and then from the
 2d Ray 398, Mother proceeds from the Family Government
 3d Salk 259 and maintained. Thus the Policy of the Law
 Dany Good, 6 Mod. 87. requires, that the Settlement of the Child should
 follow that of the Parents: — As if a Widow mar-
 rying again is not bound to support to support
 her former Child, the reason for this acqui-
 ring her Settlement ceases, unless as I mentioned
 above they be under the age of 7 years, till which
 time they must remain with her for Nuptial

According to the Lord Dac & Ward gains no
 Settlement by living with his Guardian. Because
 he requires no Settlement without he supports
 himself. — Our Law requires that he should
 have remained 7 years, and have supported himself.
 He must have been able to have supported him-
 self. — is the meaning of our Law & Ward ac-
 quires no Settlement in this manner.
 Root, 1312.
 *page. 288;

A Settlement once acquired can be lost in
no other way than by acquiring a new one. For
by acquiring a new Settlement the old one is lost. W. Bond, 303
A man can't have two Settlements at one time. Salk 528-9,
any more than in Philosophy a thing can be Burr Settled
in two places at one and the same time. The Cases 370
can lose it no other way. No Law nor Decree
nor the Public can deprive him of it —

And while I am on this point I will take
a short time to explain to you our Law. —
Now you will observe that an Indigent must
have Real Property to the amount of \$100, be-
fore he can gain a Settlement. He may have
property perhaps in every Town in the State.
Yet he can have no Settlement but in one Town;
and he must reside in that Town; and when he
has the qualification for a Settlement in another
Town, he may acquire that Settlement by remo-
ving thither. Thus holding property in another Town
in what way, he could in Law, a Settlement in
"Esse" not in "Esse". He has it potentially, not
actually, till he removes and settles there. —

A question was here asked. Suppose a
Child is born on the border, where would he
be settled? I answered says "Mr. Gould"
independent of Stat. (for they have in England
Stat. providing for cases of this kind) that if it

be a pauper it must be supported as a pauper
in that State to which the Ship belongs.

And Infants may under some Circumstances
acquire a Settlement of his own by Commorancy,
1 Root 131-2 and when he acquires that his "derivative" Settle-
ment is lost. Thus in England an Apprentice
12 Bond 304 may gain a Settlement by residing with
22 Ray 507 his Master - but our Law is different. Com-
35 Rep 350 moryancy never gives a Settlement to an Ap-
prentice. ^{Learning} The general principle of our Law
and the Law of England is different.

And whenever an Infant gains a Settlement
he is "ipse facto"-emancipated, i.e., he is no longer
35 Rep 358 a servant of his Father. After a Child is
1 Aug 438 emancipated i.e., after he ceases to be a servant
10 831 or subordinate in the Father's family, he can
85 Rep 479 take the benefit of any new Settlement, acquired
1 Wilms 182 by his Father, for he is not supposed to have a
Bar 1000 subordinate right, nor is he bound to follow
Cates 270 the Father's Family.

Now the emancipation of a Child may
be effected in three of four ways. "Nam" -

1. First, by attaining full age, the Father has
1 Wilms 183 then no more power over him, than he has over
35 Rep 358 a free child.
3 Bar 1000
Cates 270, as he grows - so he is emancipated, -

Second, a Child under age becomes em-
ancipated -

emancipated by Marriage - the reason is that as the Child has now contracted a new relation, and ^{Aug 831} has incurred new duties inconsistent with his ^{Do 438} state of servitude. He shall therefore not be subject to his Father, - and upon this ground it is that marriage occasions the emancipation of any Infant Child. -

Third. An Infant Child may be emancipated, by acquiring a Settlement of his own - the acquiring of an original Settlement is in itself an emancipation, as in the Case of an Apprentice in England who he acquires a Settlement by Coverture. He is emancipated from being Servant to his Father, for it would be inconsistent, that he should remain subordinate to his Father, and at the same time be under the Government of his Master. As a minor Child when emancipated, can gain a Settlement - so as the other hand, the moment he acquires a Settlement he is emancipated,

Fourth. An Infant Child may be emancipated by acquiring any relation inconsistent with his remaining a subordinate member of his Father's family - the second Branch being that of Marriage, might come under this General head. But it is always treated by itself. - Thus a person enlisting in the Army, and becoming

a Soldier is emancipated, he now acquires a
 new relation inconsistent with the Condition
 35 Rep. 110 of his Father; this has frequently been determined,
 D^o 380 how long he must remain a Soldier before he
 8 D^o 247 is emancipated. I do not know, nor do I see
 8 D^o 479 why, after remaining but a short time, and
 3 D^o 588 being obliged to cease to be a Soldier he might not
 Cases 638, again be under the Control of his Father
 but the Law appears to say he is emancipated
 by the act of enlisting.

But the the attaining full age & a regu-
 larly occasion emancipation, yet there is no
 emancipation if he continues a member of his
 53 Rep. 202 Parents Family. but this must be meant while
 2 East 270 he acts in Capacity of Servant - To be sure
 whether he continues as Servant or not, he is
 entitled to have his other Privileges, and his dis-
 abilities are removed. This rule alone is with
 respect to his right of Settlement

3rd A Settlement may be acquired by
 Marriage. thus a woman marrying a
 man who has a Settlement in another place
 1 Hy. 544 the Husband and Settlement is immediately com-
 528 mitted to the Wife, and hers is lost. This
 202 is upon the same principle as that where
 Bur. Sett- the Childs Settlement follows that of the Parent,
 Cases 102 when he acquires a new Settlement, they are one
 D^o 371 Family the Law not permitting the Separation
 of

of Husband and Wife, she is and his Controll.

If then a Woman settles in A marries a Husband settles in B, his settlement in B, becomes hers and she "pro facto," loses her maiden settlement. Salk 528-9
Bourne 383
Bourne 122
D. 370

And it has formerly been decided in Bury St Edmund 544. law that if the Husband has no settlement, the settlement of the Wife is suspended during the coverture, tho, it will revive on the death of the Husband; - this rule is not now considered as Law. Upon this rule a Way made the following Verse

A Woman Having a Settlement
Married a man with none
The question was he being dead
If that she had was gone?
Quoth Sir John Palk the Settlement
Is suspended & it remain, -
Living the Husband, & at him dead
It took revive again. -

Chorus of the Duenna Judges
Living the Husband, & at him dead.
It took revive again. -

But it seems now established by late authority that if a Husband Having no settlement marries a Wife who has one, and he does not remain in the realm, or being in the realm does not live with and support her, her settlement is continued i.e., Bourne 122
D. 370-1-3

it is not suspended; in a Word if he has none
 his Settlements continues of Course, and in this
 Case the Children are settled with him. It is
 not suspended as to him; and the legitimate Child
 need have a right to it. - this clears those
 marks I had to make on the present Title -

350?

361
Master and Servant

CONGRATULATIONS - TO THE

Master and Servant

by James Gould Esq.

May 1872.

D

A Servant is one who is subject to the personal authority of another.

A Master is one who exercises that authority.

To constitute this relation the authority must be personal, one subject to civil authority is not properly a Servant, for it is only subject to the Law.

The authority exercised by a Master is Gen.^l by virtue of a Contract in the servant or his Guardian who not lawfully.

In Conn.^t there are 6 kinds of Servants.
1st Slaves. 2 Apprentices. 3 Menial Servants. 4 Day Laborers. 5 Agents for any kind of Orders assigned and served under the State of Conn.^t

Of these the 1st and 6th are unknown at C. E. 1836 42327. 1842 4549. 1844 4549. 1845 4549. 1846 4549.

It has been doubted by many whether Slavery was ever legalized in Conn.^t for myself I have no doubt it has been. J. Gould Esq.

Of the morality of Slavery I am not
about to speak fully further than to observe
that it is obviously immoral.

If Slavery has been legalized in Court,
it must be either by National Law, the
L^o of England, or our own local Law.

Robt 423 It has lately been legally authorized
or moral Law.

Dr. Com Law there is no such thing as
Salt 600 private Slavery of any kind. And it has
Salt 1 been a long established opinion in England
that the Laws of another Country is a
transitory foreign Law, each the enforced in
1. Inst. 794 England. Therefore a foreign
Salt 424 Slave on landing in England becomes free
Robt 600 & is protected in his rights of personal
Liberty and property.

Robt 94 There were in England, under the Feudal
Salt 800 & 800 system what were called Villains, they were
189, 194 Slaves to a certain degree, tho not to the ex-
treme but look now existing in some Countries. At
Robt 307 this time there are no Feudal Slaves at
Robt 307 Feudal Slaves were abolished by Stat 12 of
Edw. 1 & Charter 2nd.

By our own local Laws a legal-
ized Slavery has been legally authorized, the

the Judge Rouse, thinks otherwise. It is not
indeed sanctioned expressly by any Statute ^{St. Cons. 141}
either here or any where else that we have ^{Do - 228}
Slaves Counting on Slavery which recognise ^{Do - 337}
it as existing and as known to the Law. ^{Do - 360}
^{Do - 399}

There have been no judicial decisions
expressly authorising Slavery but Judges
have frequently ~~expressly~~ ^{indirectly} expressed
opinions that Slavery was legal here.

Decisions have been given in Court
that recognise the right of the Master to
hold and to transfer a Slave &c.

Which absolute Slavery has never been
authorised in Court. - The Master has no
right to take the Life of his Slave and the
deliberate killing a Slave is as much
murder as the killing of any other person.

The Master has no right to abuse his
Slave and is liable to an action by the
Slave. Slaves here may hold property and
may maintain an action for it even
against their Masters.

It has always been holden in Court
by the Sup. Ct. that the Maning of a
Slave with Consent of his Master workman
emancipation, on the ground that the man-
ning State is inconsistent with a State
of

25th Dec 511 of servitude, or subjection to his Master. —
 55th Rep 356 On the same Principle on the lawful
 marriage of an Infant he is free from the
 personal Control of his Parents. —

In the French System a Girl or former
 25th Dec 187 female Slave, was not emancipated by
 25th Dec 93-4 marriage with a White man, though it does
 not appear that there was any Consent of
 the Master. —

1st Dec 123 and 13. But if a Girl married a
 130th Free man she was emancipated during the
 13th Dec 137. Corollary, and if she married her Lord was
 25th Dec 374. emancipated forever.

It has also been made a Speculative
 question whether an illegitimate Child
 can be a Slave by birth. Where the
 25th Dec 934. marriage of the Child is a "Partus legitimus"
 25th Dec 187. "Partus legitimus" obtains it may be a Slave. Such
 is our Law, or rather our usage. If the
 marriage was that the Child followed the Con-
 dition of the Father, it could not be a Slave
 because a Bastard has no Father in Con-
 sideration of Law.

Slavery is now almost
 totally abolished in Great Britain. The Slave
 Trade has been long prohibited under several

Seven Penalties

We have 2 Stat^s in Conn^t
which have almost entirely abolished, St. Ent. 399,
Slavery. One of them declares that all ^{Conn^t} 482,
Slaves born after the 1st of March 1784
shall be free at 21. and the other that all
born after the 1st of August 1797 at 21. -

Laws are now enacted in every
State except South Carolina for abolit-
ing Slavery, and now by a late Statute
Congress has put an end to the Slave Trade.

2 Apprenticeship

derived from the French,
and "apprenticed" to learn, & usually 1 B. 426
bound to serve to receive instruction, tho'
not always

The Contract of Apprentice - 6 mod. 182
ship, made by G. E. he has died and a par. 22 B. 118
Contract of apprenticeship is not binding. 28 B. 64
and if not under Seal is rejected for every ^{Conn^t} 492
that purpose and can't be construed as ^{St. Ent.} 379
creating any other species of Servitude.

It has been said by Bacon & others, 3 B. 445,
that this relation can't be created until the 1 B. 118
Servant was named in the Deed, - but this ^{Justice} 57
is not law and has been otherwise decided.

8th Rep. 379 by the Q. of B. But the intention of the,
18th 533-4 Parties must clearly appear.

All other Servants may be retained
by Parol. for this no reason appears in
3d Ac. 540 the Books. but the reason of the difference
I apprehend is that Apprenticeship is by
Record &c. I had considered a much more strict kind
of Service than any other.

In England the Children of Paupers may
R.C. 420. be bound out by the overseers of the poor with
the consent of two justices, and then to whom
they are offered are bound to take them. —

We have a similar Law in Const
M.C. 60 except that there is no Compulsion. No —
D. — 343. take them. Females are to serve until
they are 18 and Males till 21. —

Section 2. Apprentices are by Law entitled to
no wages for their Services. Hence there is no
8th Rep. 379 implied Duty on the part of the Master to
pay them. If however there is an express
Contract for wages the Master must pay
it.

All other Servants (except Slaves)
are entitled to wages for their Services. If
18th Com. 428 there is an express Contract the Law implies
an agreement on the part of the Master to,

no pay which the Services are reasonably
worth. for which the Servant may maintain
an action of *"Indebitatus Quasi Servitum"*.

In England the wages of Servants in *House*
bandy, is settled by the Sheriff of the County, *180 Com 428*
or Quarter Sessions. But the wages of other
Servants are settled by written Contracts.

In *Conn* also the wages of Servants are
settled by Contract *explicitly* or *implied*.

In England, by Stat. 5th Elizabeth. In-
fants may bind themselves by Indentures for *180 Com 420*
Apprenticeship. tho. he is not bound by the *Ceo* for *49*
Covenants contained in and consequently is not *Ceo* Ch. 179
subject to an action for the breach of those *Do* 448
Covenants not so long as he continues to dis- *Do* 501
charge the duties of an apprentice. He is *Do* 518
titled to all the privileges and rights of an *8 Mod. 199*
apprentice. *5th Rep. 710*
1 Selw. 540

If the Father or Guardian
joins the infant in a written Indenture they are *Taught* 500
bound not only by the Covenants which they *Do* 518
have stipulated for themselves but also, and *8 Mod. 199*
bound for the performance of those Covenants
which the Infant has entered into.

We have in *Conn* as such Stat as 5th Elizth
as a Minor is in written bond by an Indenture.

Because the Contract is fiduciar^y and is a
trust reposed in him on the Ground of Sound
Personal Confidence in that merit or shew
of the Master, and is therefore not assignable

Upon this principle if a submission to arbitrament is made of difficulties existing between the Master & Apprentice an award to settle the apprentice is void.

Tho' at C.S. an assignment is not val-
id as between the Master & Apprentice for ^{Edw. 1838}
the purpose of assigning the Masters right ^{Sal. 68}
in the apprentice. Yet it is good as a Co-Don't ¹⁸³⁸
as between the Apprentice and Assignee ¹⁸³⁹
tho' the Assignee can't maintain an action ¹⁸⁴⁰
on the original Indenture. ¹⁸⁴¹

So the Law will not allow the Master & Servant
to send the apprentice abroad without by
agreement of the parties or the nature of
the business requires it.

Now the death of the Master ^{His} ^{and} 28 May 33rd
or Administrator, each holds the apprentice ^{at the} 68th
as he is not assignable so he is not trans- ^{His} ^{and} 28 May 33rd
mitted ^{at the} 68th

But it has been told on a good
 word that the Ex^o is bound to procure the
 apprentices^{instructed} in the art which he was
 bound to teach. this is not now said.

It has been a Question whether on the death of the Master the Ex^r or Adm^r is bound to furnish the apprentice with new clothes. In 1820 Capant, the current of opinions have been in favour of the Primaries. This rule is Pol^r 553. It seems to be unreasonable as the Ex^r can derive no benefit from the apprentice and has no control over him as he may at any time leave him and find himself to another who ought to support him.

It is not uncommon both in Eng^l and in Conn^t for the Parents to pay a Premium for his sons instruction. In such case where the Master dies or in the period of the apprenticeship the Premium has been paid out of Off^y and the couple parts of the Premium to the widow. And in one case Off^y has denied a larger sum to be repaid than was stipulated, in the Contract. &c

So where the Master has run away when the apprentice the Ct. has denied a restoration of part of the Premium.

The same has been done where the Master has become a Bankrupt because Bankruptcy is said to be "ipso facto" a discharge of the apprentice. &c

Justices have authority to order a res-
toration of specimens where they have paid
or to discharge. — D

1800 120
Talk? 57
Do — 490
11 Dec 1/10

Whether the Apprenticed costs by
his labour belongs specifically to his Mas-
ter. —

Sup^d 580
1st Inst^d 117th
12 Dec 1/15
6th Do — 89
18 Aug 1803
Talk? 58

This rule does not apply to any
other kind of Servants except Slaves. The
masters remedy in the above case is
by action on the Case for damages. or
Diss of Service. — or by an action against
the Servant for a breach of Contract. —

Cio In^s 553
3 Dec 1802
Do — 567
1st Inst^d 117
2 Dec 1803
7th Monmouth
page 301
this is the most
complete of the
English law
1803

Property of any kind earned by the Ser-
vant or Apprenticed during the period of
his apprenticeship may be recovered by
the Master in any proper form of action
whether such labour were with or without
the Consent of the Master.

Sup^d 580
12 Dec 1/15
6th Do — 89
Talk? 187

But the Master has a right only to
such Property as the Apprenticed acquires
by his labour. — But Property coming to
him by Descent. Dico. finding where it is
not the Master's. — D

If a Servant is enticed away by a
third Person such Person is liable to an
action on the Case for damages. page 415.

(Dover 50)
1800 120
38 Dec 1/10
20

Cooper 55 If the servant or journeyman is taken away
 2d. Reg 1117, by force the master action agt. D. wrong.
 Falk 360 D. is action of trespass - but if by D.
 2d. Reg 165 tying action on the Card. -
 2d. Reg 163 D.

In England an apprentice gains
 a settlement in the parish where he served
 the last 40 days' under his indenture.

St. Cour 240
 D. 482

Our Law in Court is very different -

Under our Stat^o if an apprentice or
 any other servant of 15 years old or upward
 St. Cour 293 desert his master's service, he is liable
 D. 294 to serve twice the time of his absence
 after the expiration of his original time
 of service. -

Lecture 3

The third Class of Servants are Menial
 Servants, or Domestic, so called because they
 are employed "inter menia" and with
 regard to these there are hardly any rules,
 which do not apply equally to every other
 species of Servants. D

1864 425
 1864 425
 1864 425

In England if no time of service is
 fixed, the hiring is considered as a hiring
 for a year. We have no such rule in Court.

In England by Stat^o 15 of Elizabeth
 1864 255 the Servant can't leave his Master's service
 nor the Master dismiss his Servant at the

end of a year without 3 months previous notice. - We have no such rule in Conn.

The fourth Class of Servants are Day-Laborers. - There are no Gen. Rules which apply exclusively to them, except a Stat. provision that those who have no visible livelihood may be put out. - 4 Bp. 426.

The fifth Class of Servants are Agents of those there are various kinds. all Com. 1 Bp. 427. Artificers one Class of Servants, as Tactors. Wood. 429. Brokers & Wholesale & Retail Merchants & Shopkeepers & Attorneys & Ministers are Servants in such acts D. 297-80 only to effect the Property of their employers are not Considered as in a State of Servitude.

The Master has not the same Gen. Control over them as other Servants. Yet the one bound to act according to them in all respects.

Every Agent is bound strictly to pursue his Commission to do which he is under a twofold obligation for his Com. and his own security. for if he deviates he is liable for all losses consequent.

Wood. 429.

A Tactor is a foreign Commercial Agent.

A Factor may retain the Goods of his
 principal in his own hands, so long as he is
 Ambr 2054 balanced, & his accounts. But if he once
 K. 493 gives them up the fact for a moment he
 1 East 333 has forever lost his security and can recover
 21st Dec 1154 none of it. He has a lien on the Goods so long
 2 East 227 as they are in his actual possession
 De --- 333, and this lien
 in fact is only as long as he is in possession
 300 d. 12 that can be no lien on Goods not in possession.

And if a Factor has sold the Goods he
 has a lien on the price and may compel
 Cooper 251 the Purchaser to pay the "bank note" money to
 De --- 256 him and if he pays it to the Principal at
 the value of the Commodity he may be compelled
 to pay it again to the Factor.

A Factor has no lien on the Goods
 35th Dec 119 of his Principal unless they come to his ac-
 28 Dec 117 tual possession - a constructive possession
 1st Dec 154 gives no lien. He can hold them in pledge and
 need not possess them.

No article of Goods is considered a Con-
 structive possession yet there no lien can ex-
 ist as "in transit" may be stopped "in transit".

If a Factor gives more or buys less than
 his Commission warrants, his Principal may
 18 May 510 disclaim the purchase - the Principal is
 however bound to the extent of his Commission.

If a Factor sells for us than his Com-
mission warrants the Agent himself must
bear the loss. 17th Sep. 510.

It is a Principle of Mercan-
tile Law that a Factor has no right to
paw the Goods of his Principals and such
paw is void; and on tender to the Factor of 50th Sep. 604.
the Galland due him, and a refusal by 20th 600.
the Principal to restore the Goods the Principal 11th Sep. 1178.
may maintain Trover against the Factor 18th Feb. 602.
The reason given in the Books that a
Factor cannot paw the Goods of his Principals
is that the Contract is personal and fiduciary
and cannot be transferred. However I apprehend
the reason is founded not in the law.

A Factor may in his own name main-
tain an action for the price of Goods sold, 17th Feb. 302.
the reason given is that he has a benefi- 20th Sep. 256.
cial interest in the Sale and a Commission. 7th Sep. 339.
I think however it is founded in Convenience. 20th Sep. 493.
1st Sep. 512.

The last rule applies equally to Ship & Cask. 4th Feb.

It has been lately determined that an ac-
tion may be brought in his own name for Goods 17th Feb. 81.
sold by him who, the Purchaser knew at the 20th Sep. 1-2
time that they belonged to another, tho. they 1st Sep. 49
are sold in his own name.

Yet in each of the above Cases tho. 17th Sep. 510.
the Factor is liable to the Principal.

The precise form is not material. - 2 East 142

An agent contracted by Municipal by Dec without authority given by Dec. unless it may be done in the presence of the Municipal - see cited by Dec. -

45 Rep. 513
30 R. 207-9
30 Dec 1448
Coul. Dig. 3110
titulary Cl. 5

There is this diversity between Public and Private agents. And that a Public Agent's Contract for the Public then in his own name, is not personally responsible, but the Public is liable -

15 Rep 172
D. 774
Book 89
1 East 582

The rule respecting Public agents contracting with foreign Nations is founded on the Law of Nations. But the rule respecting Public Agents Contracting with individuals is founded on Municipal Law. The burden of the person injured is always against the Public.

The last Class of Servants of ~~Government~~ are Debtors assigned in Service.

These are unknown to the Com Law. By our Stat a Debtor may be assigned when committed on R. of the Stat no 34. Create to satisfy the Debt - when the Creditor desires it and the Ct. think it reasonable.

The assignment is usually made to the Creditor who may be no any inhabitant of the State. The ground of the assignment is raised -

the Debt, and Costs out of the pocket of the Debtor
or labour. The value of the labour is to be es-
timated by the Cr. and then the assignment made
for so long a time as will satisfy the Execution.

The assignments like the Indentures of
apprenticeship are for money and cannot be trans-
ferred. Upon this ground it has been determined
that an assignment to a man his heirs, and assigns
is void. Its numerous objections are usually
made to such assignments, such as the age
the ill health the family Character &c. of the
Debtor, together with the Claims of the Creditors.
they are now very rarely made.

Rules applying to Master and Servant
Genly.

Two what Cases the Master is bound
by, and what he may take advantage of the
Acts of his Servant.

It is a Genl^y principle
4 Inst. 409 that those acts which are done by the Servant at
18 Bona 229 the Command of the Master either express or im-
26 Bona 142, plied are in legal Contemplation the acts of the
Master himself.

Regularly all acts done by
the Servant in the Master's employ are bound
to be done by the Master's Command, for it is a
maxim that "qui facit per alium facit
per se". -

There are three classes of acts which include
 all 1st Whatever the Servant does by the ex-
 press Command of the Master 2^d Whatever
 the Master permits him to do in the usual
 course of his business. 3^d Whatever the Ser-
 vant does in the shape of a Gen. Authority, and
 deemed to be the acts of the Master.

A Contract made by the Servant (i.e.,
 he having the authority from the Master, is
 deemed to be the act or contract of the Master
 so I suppose A employs B. to make a Contract
 in his name for A. to have, or I suppose he per-
 mits him to buy the Horse or I suppose he is usu-
 ally employed in such acts for his Master, as a Clerk
 is a Shop - all these are acts of the Master, and
 he can sue and be sued in his own name on them.

If a Servant employed in his Masters bus-
 iness is Cheated out of his Masters property, the
 Master may sue and recover as if the fraud had
 been practised on himself.

If a Servant in his Masters absence is rob-
 bed of his Masters property he may have an ac-
 tion ag^t the Thief, or Robber. This action
 given to the Servant is said to be founded on the
 liability of the Servant over to the Master. But
 this.

3 Baco. 60
 Falk. 843
 3 Baco. 889
 4 Baco. 313
 12 Baco. 34
 11 Baco. 81

But this is not necessary to support the action
 "Mr Gould" thinks the reason is rather because the
 Servant has a qualified property in the Goods, and
 he can hold them agt all other persons but the true
 owner; his right of possession is itself a Gene-
 rous interest, and he therefore is in the situa-
 tion of a Common Depositary.

Mallo. 115. In the Servant in Case of Robbery is not
 Crim. Jus. 205 liable to his Master (as the Case may be).

A former money against the Master & the
 Saleh. 127. Servant is a bar to the action of the other, — and
 1 Saleh. 315, in the mere commencement of the action.
 by one, abates the other.

The Servant when he takes possession upon
 2 Saleh. 379. the Goods, as his own property, as the Master would
 3 Saleh. 289. so, for he is the owner of all other persons
 4 Saleh. 173. but his Master (and so of all Bailiffs), and this rule
 confirms the above opinion as varied respecting
 the ground of the Servant agt to sue at all.

But if the Servant is robbed of his Master's
 5 Saleh. 513. Goods in the presence of his Master the latter only
 Hawk. 148. can maintain the action, because the Servant is
 6 Saleh. 145. supposed not to have a sufficient property in the
 returned property in such Case is considered to be in
 the Master.

page 357 From the money of the Master is gained
 by the Servant by any illegal Contract or fraud
 the

the Master may recover as if it had been taken from himself by any illegal Contract. 3. Bac. 359.

But if the Servant embezzles and squanders away his Master's Money there being no fraud or illegality practised upon him, and he received, not knowing it to be his Master's, he shall have it and the Master has no remedy, for if one of two innocent persons must suffer by the wrongful act of a third, he shall suffer in whose employ the party injuring was. - *Supra* - 28 Rep. 90 page 349^b

If an Intemperate Servant sells his Master's Goods the Master shall be liable tho' it was done without his knowledge and against his wish. - 1. Bond. 430 8. Co. 32, 1. Roll. 95
This is not the Case with the Servants of other men, for Gravelles are of necessity obliged to place Confidence in Intemperate, the Law has therefore placed them under the obligation to provide faithful Servants. 3. Bac. 503 Dy. 200+ 2. Bac. 598+ 1. Roll. - D.

So if an Intemperate Servant sells or wholsome liquors by which a damage ensues the Master shall be liable. - This rule is founded in Public Policy. *Supra*.

But it is said that the Servant is not himself liable even if he knew the liquor to be pernicious, because he acted by the Command of his Master. 1. Roll. 95 3. Bac. 503 1. Bond. 430 1. Rep. 328 2. Bac. 598+ 2. Dy. 350-87

But says

But say Mr. Gould - this reason does not warrant the rule which is very questionable, or very incorrect. Suppose a servant should give a guest arsenic. He ought clearly to be punished - if he did it wilfully. This is indeed a strong case but if he is liable in this case, he is liable in the other the law is a law again.

It is also said that a servant is bound to obey only such commands of his master as are honest and lawful to be done. If a servant does an unlawful act by the command of his master he is liable.

But it is said that if a servant in obedience to the commands of his master, ignorantly does an unlawful act he is not liable. { 3 Bac. 503. If the master confines a man in a room and delivers the key to his servant orders him not to permit the door to be opened, here the servant is not liable, for here the act itself is unconnected with any other circumstance is not unlawful.

But if such wrong act is accompanied with force, the servant is clearly liable. For when the act is forcible the law does not consider the intent of the actor in determining who shall bear the injury resulting from such act (i.e. if the servant is liable, in the first instance, to the party injured - tho. he has his remedy against the

the Master by whose command he does the unlawful act, and who is liable civiliter for all the consequences. - But the servant can have no remedy ag^t his Master if he knew he was doing wrong. Yet if he did not know he was doing the unlawful act, and is afterwards found for it, he has his remedy ag^t the Master. &c. If his Master sends him into another's lot to cut wood - by telling him it was his own, and he is found for a trespass, his remedy is ag^t the Master.

On the other hand those acts of the servant not done by the command of the Master either express or implied, are not deemed necessarily the acts of the Master.

3 Galb. 282

There is a vulgar error that the Master is liable for all acts of the servant and is father for those of his child. But when the servant does an act without the direction of the Master or father, and not in the discharge of the Master's or Father's business, either Genl or Special, or entrusted to him the Master is not liable. But if the servant or Clerk is a slave contract for a piece of land the Master is not holder unless he afterwards assents to the contract.

It has been lately decided that where a servant actually employed in his Master's business voluntarily goes and agrees to another's.

1 East 100.

Wharfedale 441

the

the Master is not liable.

12th Nov 405

Woodward says does a different rule in
C.C. When a servant drives his Master's Coach
agg. that of another and damages the latter then
the Master is not liable. But I think it was not
done in furtherance of his Master's business.

It was formerly granted by the Judges
that a Master was in such case liable
and it was first decided in "East" that the
willful act of the servant was his own act.

It is now well settled that if a servant
in the performance of his Master's business

Rank 100 commits tho. negligent or want of skill, or

Rank 442 injury to a third person the Master is liable

Rank 120 and I am satisfied that this distinction be-

Rank 648, tween the two cases is just. In the first

Rank 431 instance it is not the act of the Master, be-

Rank 441 cause it is willful in the servant and not

Rank 739 done immediately in the service of the Master.

Rank 405. But if a law act done from want of skill

+ Rank 502 and in his service it is unquestionably his

Rank 639 act. The Master must ^{be} a faithful and skill-

ful servant as respects other persons, or else it
is at his peril.

So if a Surgeon appointed in-
jures the wound of a patient thro. neglect or
want of skill the Master is liable.

So also if an apprentice to a Blacksmith
injures a Horse in shaving him the Master is liable. *18 Bond 431*

This distinction between willful and
negligent fault, has been long ago settled.

The first Case in the list of *2d Henyon*
was that of a servant willfully driving his mas-
ter's Coach agt another, and the objection was
made agt the form of action that it
ought to have been *Suspense* instead of *Case*. *2d Henyon 125*
Because the injury was immediate. Hence
the decision was right viz that *Suspense* would
not lie yet the reason given was wrong. No
action whatever would lie & established.

The next was an action of *Suspense* for
a negligent injury and the Ct decided *2d Henyon 442*
that it ought to have been *Case* and that
Suspense could not be sustained. *2d Henyon 445*

In 1800 came up the last Case of an
action of *Suspense* for willful driving, and *Salk 441*
injuring a servant to the former decision, and
it was held that no action whatever would lie,
agt the master.

If in any Case the Master
is liable for a forcible and intentional injury *1st Henyon 442*
as done by his servant without his direction *2d Henyon 445*,
the proper action is *Suspense* on the *Case* and
not

and not *Gustaf v. de armis* for he can only be liable on the ground of negligence in choosing such a servant.

Supra

But if in such case the action is agt the servant the proper action is *Gustaf*. and when it is said that the acts of the servant are the acts of the master it only means that it is so *vicariously*.

It has lately been determined that if a servant employs another in his master's business which causes tho. neglect or want of skill injures another both the master and servant are liable, and not the intermediate servant.

A very strong case of this kind has lately occurred. A carpenter B built a house at a certain stipulated price & employed C to do the labour, and C procured D to get the materials. D left some lime in such a situation as that a carriage was overturned by it and broken - It was held that A was liable for the damages, and the ground of the decision was that the lime was left there in the business of A.

+

And this rule has lately been carried so far as to the third or fourth servant. Mr. Jones thinks this is questionable on sound principle, for no man may be willing to employ A to do any work for him tho. he may not

In all Cases where there are several in-
termediate agents the action must be either
agst the Master or the immediate agent - for
the intermediate agents can neither be liable
as Masters nor as persons, doing the injury.

When the wilful act of the servant, a-
mounts to the violation of a Contract between
the Master and the party injured, the Master
is liable on the ground of being party to the
Contract. But if he is not party to the Con-
tract he is not liable.

I know of no authority de-
ciding in point but it appears to me to be
clear. Law. and on the same principle it is
that if the servant of a Blacksmith wilfully
damages a Horse the Master is liable on the
ground of an implied Contract that all due
diligent care and skill shall be used.

On the same principle a Sheriff is li-
able for the torts and defaults of his Deputies
or under Sheriffs

The mere assumption of duty
the Sheriff only is liable at C. L. as if the
omits to send or wait so long an execution
the action lies only agst the Sheriff for the
ground of the action is the neglect of official
duty - and the Deputy is unknown at C. L.
as an Officer.

55 Rep 411

11 Rep 158

38 Rep 166-57

James v. Wilson

70-734

Dang 42

28 Rep 154

38 Rep 832

20 Rep 916

38 Rep 309

West 338

page 400

1078

Co. Dig 349

Salk 18

20-441

Case 400

Co. Dig 513

2 L 513

How justified facts the Deputy as well as the
Salk. 18. Sheriff is liable. If the Deputy break an outer
Exp. Dig. 183. Door in the execution of C. D. Process he is
liable, and he is sued merely as a wrongdoer
and not as an officer.

So also as C. D. the Deputy is liable
for a voluntary escape for it is a positive
fact, but he is not liable for a negligent one.

None of these distinctions are however
known in Conn. for the under Sheriff and
jailors are but known officers, and therefore
officially liable.

See vol. 3^d
Declension 5-26
Salk. 16
at top
De page 82

Ex. Dig. 140

Case 487

Conn. Rep. 100

Case 754

De. 704

Salk. 17

34 Conn. 443

2. Phil. 961

Exp. Dig. 183

Conn. 430

Ex. Dig. 224

Case 185

From the analogy of Master and Servant
to Park-Masters and their Deputies, several ob-
jections have been made to subject Park-
Masters for the defaults of their Deputies. —

But by the English Decisions, they are not
liable for the defaults of their under Officers,
and are liable for their own defaults.

The Park-Master is not to be viewed in
the light of British watchmen who deposit Letters
in the Office. He is an Officer of the Comm.
much a public Servant, in the appointment,
which he makes he acts for the public like

The Post-master is however liable for his
own defaults - So he is liable for any exor-
bitant practices in his office. See De. 185.

Liability of the Master upon the Contracts of the Servant

It is a Gen^l rule that a Master is bound by a Contract made by his Servant for him, whenever, and in the Servant acts within the Scope of an Authority delegated to him by his Master, and this Authority may be either General or Special, express or Implied.

2 Warr 543.
 643.
 2d Ray 224
 3 Salt 234
 10 Me 109
 33 App 757
 8 D 531.
 18 Mo 457.

A General authority is one which is not confined to any particular Contract, but extends to Contracts generally, or to all Contracts of a certain kind or description.

A Special authority is one which is confined to one or more specified individuals, Contracts or transactions - as if one employed another to buy him a Horse, or to hire one to be

An express authority needs no definition.

A Gen^l authority may be implied from the Master's Gen^l or frequent practices - as when he employs a steward to purchase necessaries.

A Special authority may also be implied tho. it rarely happens. Thus if a Steward makes a Contract in the presence of his Master, and expressly for him, and the

and the Master knowing it does not prohibit
 W^h Bond 431 it, his Silence and acquiescence is construed
 + W^h Bond 131 into an implied authority to make such
 contracts for. - "Qui non prohibet cum pro-
 hibere possit, jubet" -

30 B^h 234 If the Master has always made it a
 B^h Bond 95 practice to send his servant to purchase goods
 W^h Bond 430, with money and never permits him to trade
 in any other way he is not bound to answer
 page 110-11 for the purchase of the servant upon credit,
 of his Master

Supra
 Com^o 450, it is permitted. sometimes to purchase on credit
 and sometimes with money. - This implied
 authority may relate to individuals or to the
 Pub^l B.

page 110-11 And if a servant without authority
 Com^o 450, purchase goods for the Master and such
 Ch^h B^h 20 titles come to the Master and the Master shall
 B^h B^h 234 be liable tho. no credit had been given to the
 + 30 B^h 234 servant before

This using such articles is con-
 sidered into an assent subsequent and such
 an assent in Law is a ratification of the con-
 tract "ab initio" -

But suppose the Master has
 not given the servant any authority either
 D

express or implied. But in a particular Case 50 Kay 234
 gives his Servant Money, to purchase certain ar- 35 Salt 234
 ticles, and the Servant purchases the articles. 35 Rep. 700
 upon trust, and keeps the Money, which arti- 10. Mod. 110
 cles afterwards come to his Masters use, is 35 Rep. 757 +
 the Master liable? Plake 42 +

This question yet remains unsettled in
 the Books, and a book which there has been much
 doubt. But it seems say "McCord." that
 there are rules already established, sufficient
 to establish this question. I am of the opinion
 say McCord, that in such a Case the Master
 is not liable.

In other Cases where ar-
 ticles come to the Masters use, the Law is not
 upon the ground of a subsequent assent by the
 Master - but in the present Case the Master
 is by the Supposition ignorant of the Circum-
 stances, and how can we make assent to what
 he is ignorant of? - he does not know of
 such Executive Contract, and the Law would
 suppose that he has not assented to it.

The fault or negligence lies upon the Master
 and not upon the Servant for he did not in-
 tend to give the Servant Credit with the Mer-
 chant, and it was incautious in the Merchant
 to trust the Servant - and the General rule is that
 if one of two innocent persons must suffer page 387
 by the act of a third, the loss shall fall on
 him

him who trusted the rogue and by whose fault
the loss was occasioned. -

But tho. a Master has permitted a Ser-
vant to trade in his name yet he may dis-
charge himself from future liability by for-
bidding such Merchants to trust his Servants.
on his account, and if the credit of the Ser-
vant has been published he may discharge him-
self by advertisement. P

page 112 But the Master Cant Countermand the
Servants authority to Contract by any thing.
known only between the Master & Servant, as
a private discharge of the Servant, nor will
the Master be discharged from liability as to
contracts made afterwards, by the dissolution
of the relation of Master & Servant unless such
dissolution be actually known to the Merchants
who trust the Servant or unless the same be
a matter of public notoriety.

10th Dec 1709
Chitty. B. 1. 70
3d Rep. 760
Parks. Rep. 42
D. 13406
12th Dec 1746

The rule in such Cases is that the pro-
hibition to trust, or the nature of the disso-
lution should be as public as the credit be
so given to the Servant

3d Rep. 177. If a Servant in selling articles within the
+ 3d 757 scope of an authority, & delegated to him by the Mas-
ter 289. ter makes a warranty as to the quality of such
ar-

articles as are sold by him the Master is bound *Slip 308*
 by such warranty. Unless the Master expressly *D. 83, 53, 111*
 retains him from making such warranty. *Ex D. 830*
 then by giving authority to sell he implicitly author-
 izes the usual stipulations. *P*

And when the Servant in making a Con-
 tract of warranty acts within the scope of a Gen.
 authority even an express restriction or prohibi- *2d Slip 700*
 tion to the Servant not made known to the pur- *10. Mod 109.*
 chaser or the public will not discharge the Mas-
 ter's liability.

P But when the Servant acts un- *2d Slip 700*
 der a special authority, if the Master expressly *Ex D. 830*
 prohibits the Servant from making a *3d Slip 700*
 warranty then the Master will not be liable *10. Mod 109.*
 on the warranty. *2d Slip 120.*

P But it is said what a il-
 lusion does it make to the purchaser who does
 not know whether the Servant be authorized
 to make warranty or not?

I suppose the Servant of the owner of a Rid-
 ing Stable, whose ordinary business it is to buy
 and sell horses for his Master, and warranty them
 should warranty & hold up the express Com-
 mand of his Master, yet the Master will be li-
 able, because he acted within the scope of a
 Gen^l authority.

But I suppose

But suppose one authorized to sell a particular Horse with express instruction not to warrant - there is no Gen^d authority. the Purchaser had no reason to believe that the Seller had authority to warrant.

But if the Servant in fact had no authority to sell the Purchaser can never hold the Horse agt. the Master. the Purchaser takes the risk upon himself. "a fiction" he takes the risk of the Servant's right to warrant, and no action will lie agt. the Master on such warranty. This new saying "No Fault" is founded on the best reason, and soundest sense.

On these principles it appears to me "says Mr Gould" that the leading Case of *Saunders v. Hadow* laid down in *Osborne's* 109 is of very questionable authority. That it has never been cited expressly in his Law yet it appears to be inconsistent with many of our modern decisions. The Master in that Case knew the *foal* was Counterset and did not prohibit its warranty and it is well established principle of Law that the concealment of a known defect amounts to a warranty.

Another Case laid down in the *Notes* 98 Books Mr Gould thinks equally questionable authority. viz. Where a Servant sold an unsound Horse at a Fair or Market it was said that the

See Jac. 109.

Do. 459.

Supra 143.

Whar. Rep. 5.

Do. 307.

Prin. 110-11.

Notes 98.

Supra 143.

See Bacon's 57.

the Master was not liable unless he directed. 3 Bac 500
the Servant to sell to a particular person.

I cannot say I could persuade myself
that this is so ever was. And I can see no jus-
tice in the rule nor can I see any difference
between selling the Horse to a particular per-
son, and selling him to any person who will buy.

With regard to the rule that when the
servant is prohibited from making a warranty. 2 Inst 282-9
the Master is not liable. it is to be understood. Reg. 153
that the prohibition must be made known 3 Inst 757
to or easily inferred by the person with whom 4 Inst 177
the servant trades.

How far the Servant himself is lia-
ble for his acts and defaults as to stran-
gers and his Master.

The Servant himself. 3 Bac 98
is regularly not liable for Contracts made for 2 Inst 279
his Master within the scope of his authority. 3 Bac 503 +

But if the Servant takes expressly upon
himself the responsibility. he is liable and
may be subjected on such Contracts. For
when he does thus assume to himself the re-
sponsibility he does not act in the Capacity
of a Servant but independently of his Master.

In all

In all Cases where the Servant makes Con-
 1228
 2 Nov. 127. tracts even in his Master's name if done with
 express or implied the Servant only is liable.

Any Person who acts for another in
 1800m 430. pursuance of authority vested in him is to be
 considered "Pro eo acta," his Servant.

On this principle it is that the Wifes.
 Contracts bind the Husbands, for the Cont. binds
 herself by reason of Coverture. — So if a
 Minor makes a Contract for his Father the Fa-
 ther is bound by it.

We have a Stat^{ment} making an entirely
 new rule on this Subject. If any Person
 1820 Edition
 779 of
 1800m 293 under the government of a Master is autho-
 rized to contract even for himself the Master
 is liable. If he is not authorized the Con-
 tract is void.

I trust that this Stat^{ment} does not
 extend farther than to Apprentices and Menial
 Servants who are minors.

The question was never settled till the
 28th. Sep. 1739 time of Le Mansfield. Whether the Master was
 303d. Sep. 1747. liable for expenses furnished the Servant in
 sickness? — He decided that he is not. —
 18th. Sep. 1770. Sir William at "Nine Pins" decided that he is. —
 303d. Sep. 1777. B. B.

But it has been since settled in "Com Pleas"
that the Master is not liable. The decisions were super-
in the most Gen. terms so that I don't see but
they extend to apprentices

This is contrary to our usage in this State.

The great Gen. is premised as before said ^{Donnell 131}
saw that for those acts of the Servant which ^{Shinn 228,}
are done by the Master's Command express or ^{3 Bac. 502}
implied the Master is liable.

And those acts of the Servant not done by
such Command of the Master, either express or
implied, are not binding upon the Master, but
on the Servant only.

^P
All acts of the Servant not in the dis- ^{Salk. 18}
charge of the Master, business or with his and ^{Exp. Dig 503,}
thouly are not deemed to be done by the Master, ^{1 Roll 454}
Commanders and therefore not binding upon. ^{Case for 400+}
him. Hence it follows that they do regularly bind ^{Co. Dig. 173}
the Servant.

This principle embraces those Cases ^{super}
before spoken of, of W. & C. 11 For 11

There are some Cases where a Servant
injured by the acts of the Servant may have
his remedy either agt. the Master or the
Servant but his election — as to these Cases
I find my rules from analogy. — I took
therefore to be this. If the Servant in the

Aug 1083, the performance of his Master's business, does
 Wilson 328, and injury to any one either through negligence
 Esp Dig 580 or impropriety, the Servant as well as the Mas-
 ter is liable to the person injured. Provided
 55 Rep 128 the transaction in which the Servant was
 Eng 411 engaged was not founded on any Contract
 The Reg 330, express or implied between the Master and
 115 Rep 431 the party injured. - The authorities cited are
 not exactly in point -

Espey 380-0 Every Person committing a Trespass is li-
 able under whose authority he does the act -
 The Law of Trespass does not regard the in-
 tent when the act is done against the party
 immediately injured.

But if the transaction
 in which the Servant was engaged at the time
 of the negligent injury, was founded on a Con-
 tract express or implied between the Mas-
 ter and the party injured Mr Cowen thinks that
 the Master cannot be liable. - in such Cases it
 is the same as if the Master performed it him-
 self

The negative part of the rule that
 the Servant is not liable Mr Cowen does
 Salt 338, not find in the Books, but apprehends that the
 Case will support the position - as in the
 Proper 400 Case of an apprentice to a Blacksmith negli-
 gently causing a Horse, the Master only is
 liable.

The Servant is not a wrong doer in a legal sense
 neither could the Master be if he be for
 he has the lawful possession.

The injured party has sought to com-
 plain of except the injury consisting in the
 breach of the implied Contract to that the
 House will - the principle of Contract to all
 took out of the question; and the Servant
 can be no party to the Contract - hence it
 follows that the Master is liable.

To this rule there is however one excep-
 tion the reason of which strengthens the
 rule just laid down. "viz The Master of
 a Ship is liable as well as the owner for any
 damage occasioned by the negligence of the
 Master, even tho. the freighting was found
 as in the Contract between the owner and
 the freighter only." *Walt. 440, 1820. 190, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000*

This rule is founded on the
 convenience, and policy - the owner and freight-
 er, are often subjects of different Kingdoms
 and wholly unknown to each other. The Mas-
 ter visits both Countries, and in this case is
 rather an officer than a Servant, tho. he is sub-
 ject to the rules of Master and Servant.

But if a Servant commits a willful
 tort he is liable in all cases to the party
 to

Party injured tho. the transaction was
 founded on a Contract between the Master
 (Bart. 100.) and Party injured. i.e. he is liable even
 if it amounts to a violation of the Contract
 or not, and the Master is also liable if it
 amounts to a violation of the Contract. -

"
 The action of *Indebitatus Assumpsit*
 will not lie ag^t an Officer of the Revenue
 (Bart. 109.) for an overpayment (to him) but application
 must be made to the Government under which
 he acts, he receives it for the Government and
 not for himself

But an action will lie ag^t -
 (Bart. 182.) any Public Officer for money illegally exacted
 + (Bart. 209.) from an individual for hire he evidently acts
 for himself, as his own wife & co. and he
 shall be liable as well as any other wrong doer.

If an attorney knowing that there was
 a release of the Cause of Action should bring
 (Bart. 98.) an action at the request of his Client, he
 (Bart. 209.) is not liable in damages because say the
 (Bart. 275.) Broker he is a Servant, - But the true reason
 D^c 598. is the Attorney is not bound to decide whether
 his Client shall bring an action or not or
 whether the release was a valid one. his busi-
 ness is to give advice
 There must

There must however be no fraud on the
 part of the attorney. he is no more privileged
 on account of his profession than any other
 man. for when a P^lff attorney after suffer-
 ing a default entered up a judgment ag^t -
 the Debt he was tied to be liable, *see*

Spauldon 125
Eq. Dig. 0187
J

Thus far, as to the liability of servants to
 third persons. -

I shall now consider how far the
 servant is liable to the Master for injuries
 done to him. -

Thus he is regularly liable for
 all wilful wrongs and injuries, occasioned by
 negligence, &c. &c. *13th Ed. 400.*
30 Bac. 507-81

It is laid down in the Books that when
 a man beats another servant so that he dies
 the Master can recover the civil injury is
 said to be merged in the crime. *12th Ed. 89.*
Do. 90.

But says "Judge Read" the real ground is that
 that his body and property are forfeited to the public. *13th Ed. 500.*
 And an action would lie if we could but
 in this Country we have no Commission of Blood
 no forfeiture of his kind, and therefore it would
 seem that he might maintain an action. -

But the same principle if the servant lands
 Goods which are attached before the seizure and
 paid or security given for the payment to the
 they, *13th Ed. 109.*

they become forfeited, it was held that the
 servant was liable to the Master in damages
 to the amount of the goods. Thus, this was
 an unlawful act yet the servant is not
 liable on that ground, but merely for the con-
 sequent injury to the Master.

No action will lie ag^t the servant for
 a mere breach of the Master's orders, which are
 damages, is sustained. Neither will an
 action lie ag^t him for insolence or ill-man-
 ners towards his Master, for these are grounds
 of Correction.

But if the servant disobeys or neg-
 lects, to perform any lawful Command of his
 Master, and any damage ensues in conse-
 quence thereof, the Master may have an ac-
 tion and the servant will be liable to the
 whole amount of damages sustained.

And the rule is the same where there is
 a neglect of duty on the part of the servant
 and a consequent damage sustained by the
 Master, tho' there is no express Command in
 the Case, but only an implied one - as if
 an Attorney neglects his Client's Cause, by which
 it is satisfied to -

But for the purpose of as-
 certaining what neglect of duty, in the servant
 will,

10 Call. 109. for any act immediately injurious to the Mas-
 22 Sep. 1083 ter, & in Cas. the Servant is liable to the
 Master, to whom he has been subjected to dan-
 ger, for any injury to a third person occasion-
 ed by the negligence of the Servant, in his
 ordinary business

10 Call. 104. This rule however does not
 hold when the Master has actually been a
 85 Sep. 1861 party to the wrong committed by the Servant
 110. In this Case both are "joint tortfeasors," for in
 fact each joint tortfeasor is liable for the
 whole wrong done - one trespasser can't main-
 tain an action agt his Co-trespasser for his
 proportion of the damages incurred

This is a rule of Policy, for "ex male-
 ficio non videtur actio"

The Masters authority over his Servant

10 Call. 179. It is laid down generally in the Books that
 1 Hawk. 111 a Master has a right by Law to chastise his
 130. Servant for any breach or neglect of duty, as
 100. for disobedience, negligence, insolence or ill-
 170. manners,
 130. 428.

This right of the Master is nothing
 more than, a right necessarily incident to the
 relation, a right which every "pater familias"
 must possess for the support of domestic gov-
 ernment. No action in these Cases. can be
 maintained agt the Servant - But

But this Correction to be justifiable. 2. Mod. 107
must be reasonable. this reasonableness is. 8 D. 120.
gently a question of fact sometimes of Law

This rule if meant to apply to all
Classes of Servants is certainly incorrect and I
find no limitation in any of the Books.

The fifth Class of Servants surely cannot be 5 D. B. 108,
included and I apprehend the Rule can only 1 B. Com. 428
extend to those Servants that belong to the
Master's family and are under his domestic
Government. The Master has undoubtedly
a right to chastise his Slave so likewise
his Apprentices, his Menial Servants and pos-
sibly in some "Debtors imprisoned in Service"
But to Day labourers this rule I ap-
prehend does not upon Com. Law Principles
extend and if a Master beat his Menial
Servant of full age it is good Cause of re-
pudiation.

The Master cannot justify a
wounding much less a Mayhem. If the
Servant brings his Action for assault bat-
tery and wounding or mayhem the Master 2. Mod. 107.
cannot justify the wounding or mayhem 8 D. 120, 210
in his Plea if he does his Plea is all bad,
he should Plea not guilty as to that.

It is strange that the Books have

nowhere defined what in Law amounts to a
wounding. But I take it must be some
laceration or hurt which occasions a Con-
fusion.

And in England by the Statth 384
if a Master when the Slave is sued for
3 Bac 507 beating the Servant he is allowed to plead
and be not guilty as to the whole, and justify
as to part of the Perpetrator - Not so in Conn.

When a Master would
justify a Battery upon his Servant - he must
18 Co 111 state the contract, i.e. the Contract to show
3 Bac 500 that he is his Servant - and the place, and the
reasons for which the Servant was retained
for these facts are also issuable

4 Co 70 The Master can't delegate his authority
2 Mod 137 to another to contract for the Contract of
Edw 6 62 fiduciary and founded on a personal trust
D. Le 310 and confidence reposed in the Master only. -
Cro 366.

11 Co 953 A School Master's power is not delegated
+ D. 598 but its original, says Judge Hale. - The
punishes his Pupils not for the breach
of duty owed to the Master but for that
owed to himself.

1 Hale 5473 If a Master in committing his
1 Hawk 111 Servant happens to kill him he is guilty of
Hawking 65 excusable Homicide, Manslaughter or Murder

according to the Circumstances of the Case, as *Justus 262*
See also Horneier. *5. Mod. 287.*

As the Servant may in certain Cases
 place himself in his Master's stead (as will
 be shown hereafter). It is a rule that a Servant *Wheeler 587.*
 can't avoid a Debt given to a third person by *3. Bac. 588.*
 a deed of his Master (i.e.) a Debt given by him-
 self. no person the release of his Master from
 release. as to giving this Debt he is considered
 as a stranger for it is no part of his duty
 to his Master.

The Master remedy ag^t Third persons.
 for damages sustained by himself in
 consequence of an injury done to his
 Servant.

So God the Master has a right
 to recover ag^t Third persons for any tortious
 act done to the Servant in consequence of
 which he has sustained a loss.

Thus if a man carries away the Servant. *Cooper 56.*
 of another the Master may have an action *5. Mod. 182*
 ag^t him for the loss of Service. the action *1. Wms. 469.*
 being laid with a "pro quod" in the action is *Falk. 380.*
Case B. and the "pro quod" is the gist of the action *2. Ray 1115.*
 it being no other and injurious to the Master *2. Kin. 20.*
 than the loss of Service. *page 376. 3042*

22 Ray 1032 And if one Servant is taken away "à
 Do 1117 harmis - by another the Master may main-
 25 Sep 167 tain an action of trespass "vi et armis" with
 Cooper 355 a "per quod" - alleging Special Damages and
 3 Balth 191 this is the proper form of action.
 2 East 8. 13 If without force the action on principles
 page 379-80. Should be on the Case, as the injury is only
Consequentia.

If a Servant without enticement
 May 10 leaves his Master's Service without sufficient
 Term 100 Cause and is employed by another and retained -
 2 Series 63, and by him knowing the former retained, and
 circumstances be for action for loss of Service
 will lie ag^t the latter Master.

Bl. Rep. 389 In the Case of enticement retained to be
 3 Buse 1345 a recovery had for full Satisfaction ag^t the
 Page 419. Servant Pro Parto and action ag^t the Stranger.

Bl. Rep. 380 It was formerly a question in England
 32 191 whether enticing away a Servant was not
 20 Ray 1110 an indictable Offence. It is now settled that
 it is not. "Surely if there be a forcible taking,"

When a Servant is lured and the Master
 9 Coke 113 sustains no actual damage in consequence
 15 Sep 173 thereof the injury is a personal one and the
 10 Coke 151. Servant only has a right to the action.
 2 Balth 198. ^{for the party} But
 page 302. if a loss sustained the Master may have
 an

an action. Hence a recovery by one is not bar
to the action of the other. The remedies in such
cases are not in the alternative, for the inju- ^{of injury}
ries are distinct. Loss of service must be as ^{Comp. 618}
truly proved also the Master's action will fail ^{1840 429}
^{21 How 682}

A minor Child is a Servant within
these rules. And an adult Child as the Case may
be (i.e.) if he resides in his Father's family, as ^{page 301-2}
a member of it. On this ground it is, as a
Count of the relation of Master and Servant, a
Parent or one standing "in loco parentis"
may have an action for injury done to
the Child (as debauching &c.) This action will
lie wholly out of the relation of Master and
Servant, and not out of Parent and Child.
Loss of service must always be alleged as the
Cause on ground of action. But this is by no
means the only rule of damages, for the
ground of damages is the relation of Parent
and Child.

If a Surgeon employed to cure ^{3 Bar 508 +}
the wound of one servant inflicts injuries ^{1 How 98}
it by improper treatment the Master may ^{2 Bar 332}
have his action "per quod" against the Surgeon ¹²⁴
If the injury be not willful an action will ^{Exp. Dig 601}
not lie for the Master, tho' there is no ^{Ex. Dig 314}
fault the Servant can maintain an action ^{28 How 359}
on.

on the Case ag^t the Surgeon who negligently
 so far want of Skill; injures his "Country"
 I see no reason says Mr Gould, why the
 Master should not have an action for want
 of Skill also in the Surgeon. but I find no
 authority in 70 points.

A recovery for full satisfaction against
 the Servant in the Case of enticement & retained
 Philip 389 I have before observed is a bar to an action
 2 B. & 1345 ag^t the enticer or retained both actions,
 page 410, being for the same Cause. But whether
 a recovery made without a satisfaction ag^t
 the Servant will bar an action ag^t the
 enticer, is a question not yet settled. —

The Case came before Ed. Mansfield
 in Ct. of W. B. but no decision was given.
 Where there is a joint & several Contract
 a recovery ag^t one without a satisfaction
 does not bar an action ag^t the other. But
 "Stear" in the Case of John & George "a bar
 recovery ag^t one is a bar to an action ag^t
 a Co. that seizes the third in no satisfaction
 but the present question is different from
 this. — The Servant and enticer are not
 joint obligors, nor joint tortfeasors the Servant
 is here liable upon Contract and the enticer
 upon Tresp^{ass}. Howard says "Mr Gould."

I am inclined to think that a recovery ag^t the Servant, will be the better ag^t the enticer, where there is no satisfaction. It can be denied that the Servant participates in the wrong by going away.

I cannot however continue Mr Gould but think it doubtful, on the other hand, whether a recovery merely ag^t the enticer, will pay the actual ag^t the Servant. Will damages for the enticement repair the damages for the breach of Contract between the Master and Servant? It would seem less probable than that damages for the breach of Contract, would repair the damages for enticing away the Servant. And upon this consideration it would be reasonable to suppose, that a recovery ag^t the Stranger, would not be an adequate ag^t the Servant, but no more than nominal damages would perhaps be recovered, this being a matter to be left to the jury.

What acts Master and Servant may mutually justify in defence of each other.

Mr Com Law is an offence called "maintenance" for one to assist and abet another in maintaining an action.

But a Servant may assist his Master.
 18 Moⁿ 429 and the Master his Servant in maintaining
 2 Boe 115 a Law Suit, without being guilty of
 this offence, and this on the ground of the re-
 lation between them &c

A Servant may also justify a Battery
 3 Alk^o 407, in defence of his Master, and he may lead
 2 Boe 546, the same force that his Master might have
 18 Moⁿ 429, done for he puts himself in the place of
 his Master

But he can't justify a battery in
 3 Boe 308, defence of his Masters, Son or Daughter or other
 2 Lutⁿ 1481 Servant. he is a Stranger to them and therefore
 can only as a Stranger prevent a breach
 of the Peace

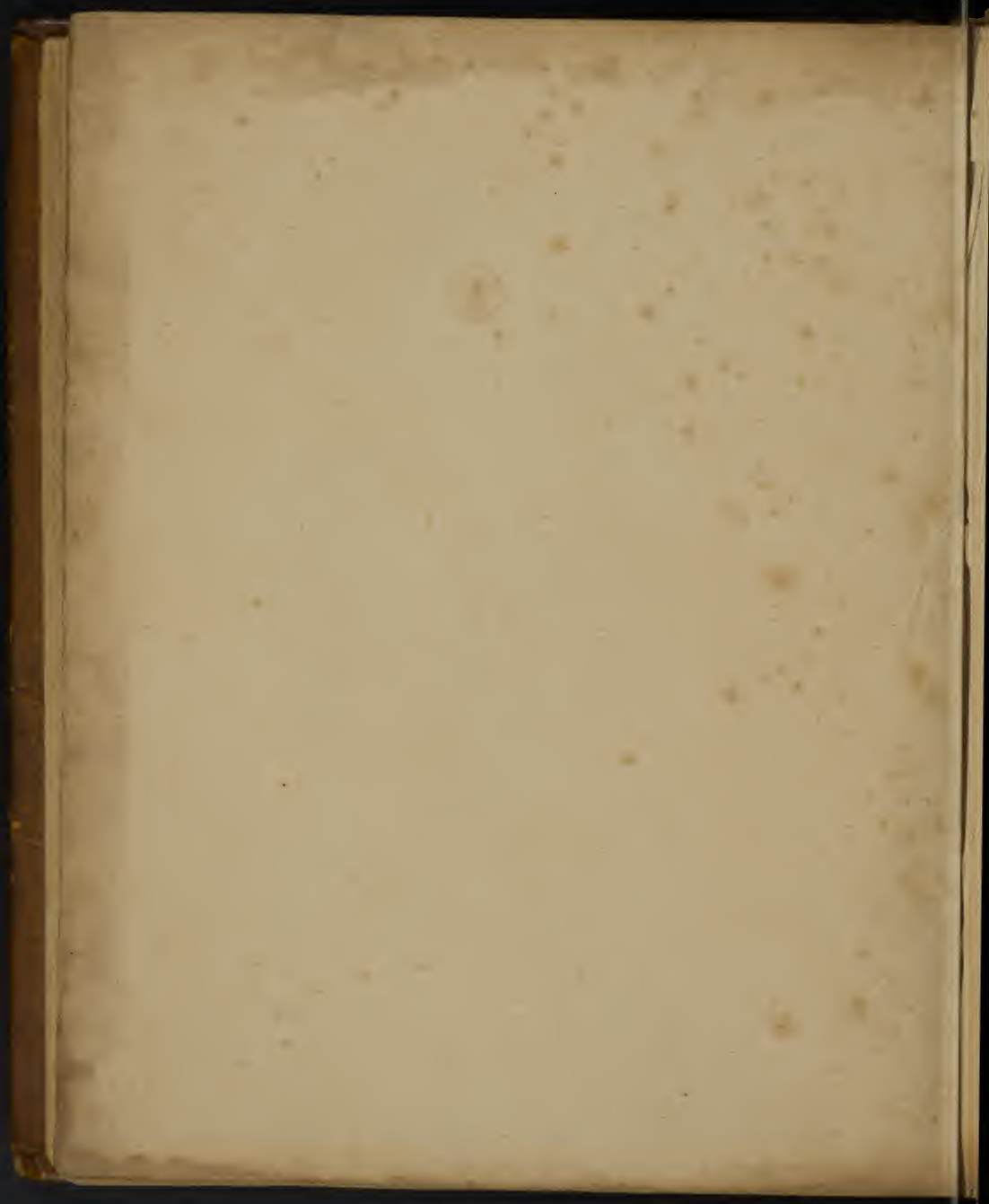
A Servant may justify, with
 force a battery in defence of his Masters Wife
 3 Boe 300, but clearly he can't in defence of his Masters
 Goods, his right extends only as to his person
 and not the person of his Wife

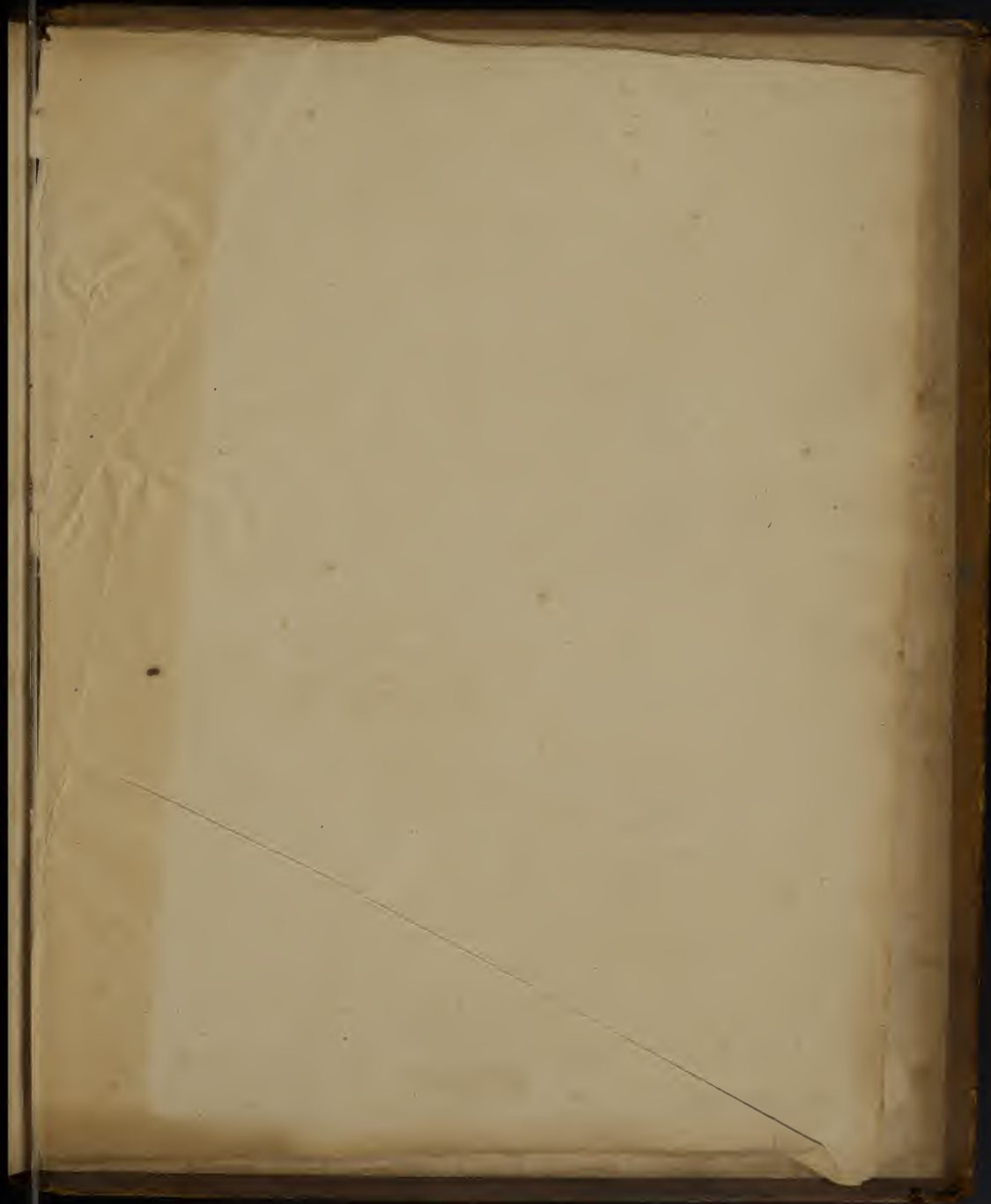
Whether a Master may justify a bat-
 try in defence of his Servant is a question not
 yet settled. — Those who support the Neg-
 1003^d 416, ative, say the Master has his remedy by action
 2 Boe 546, for loss of service. This reason is very un-
 18 Moⁿ 429, satisfactory. Says Mr. Gould what if the
 12^d Reg 32, wrongdoer is poor and unable to respond the
 3 Alk^o 407, damages?

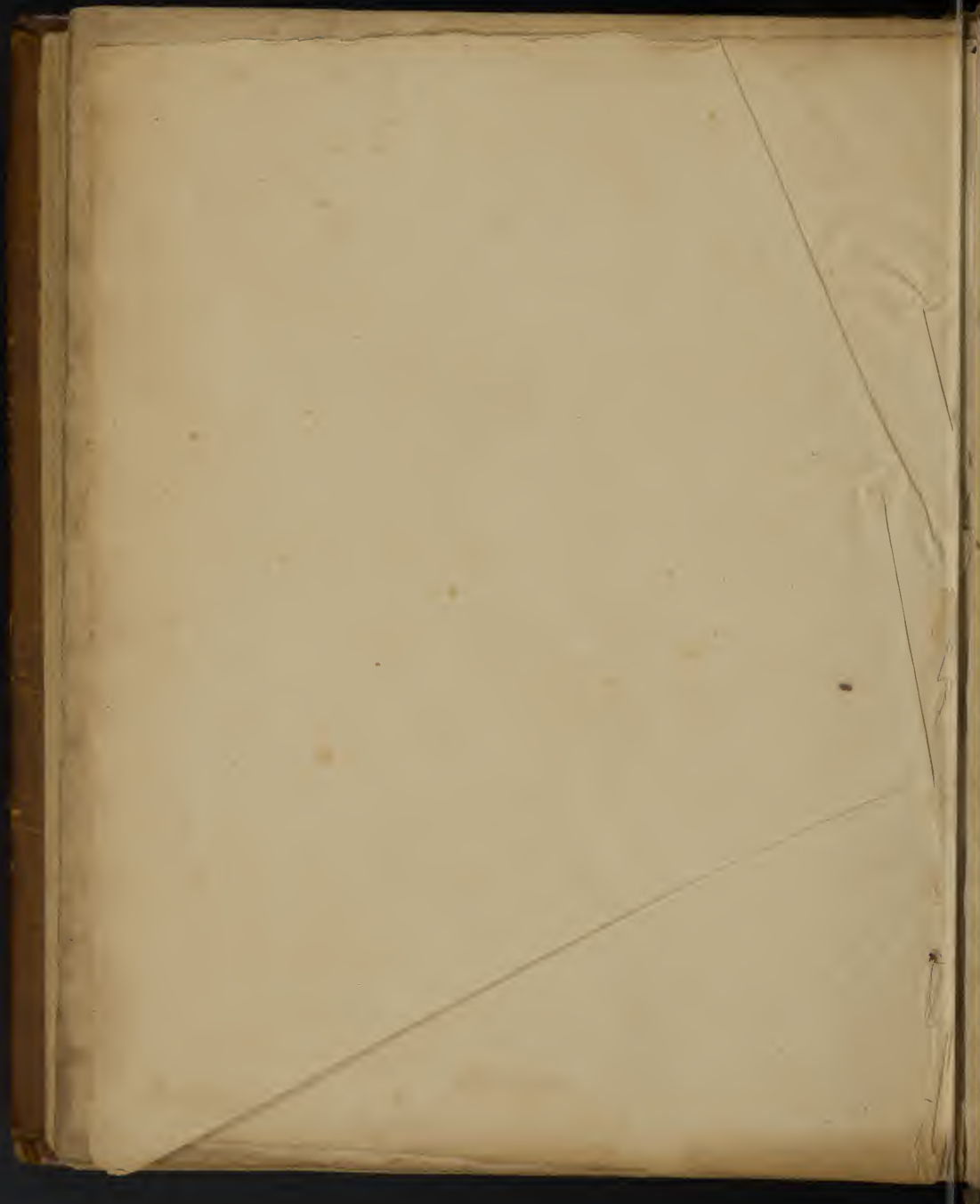
the Servants Services are a right, they are prop-
erty - But yet any man may justify a battery 2d Ray, 5th
in defence of his God; his primary right or Salk^o 140th.
he may have an action of trespass and because 2d Rolle 340th
he may have trespass at no less reason. Why he 1d Rolle 429th
may not justify a battery in defence of them. Serves. or
and therefore it ought not to apply. in Case Pleading 1204.
of battery in defence of ones Servant. //

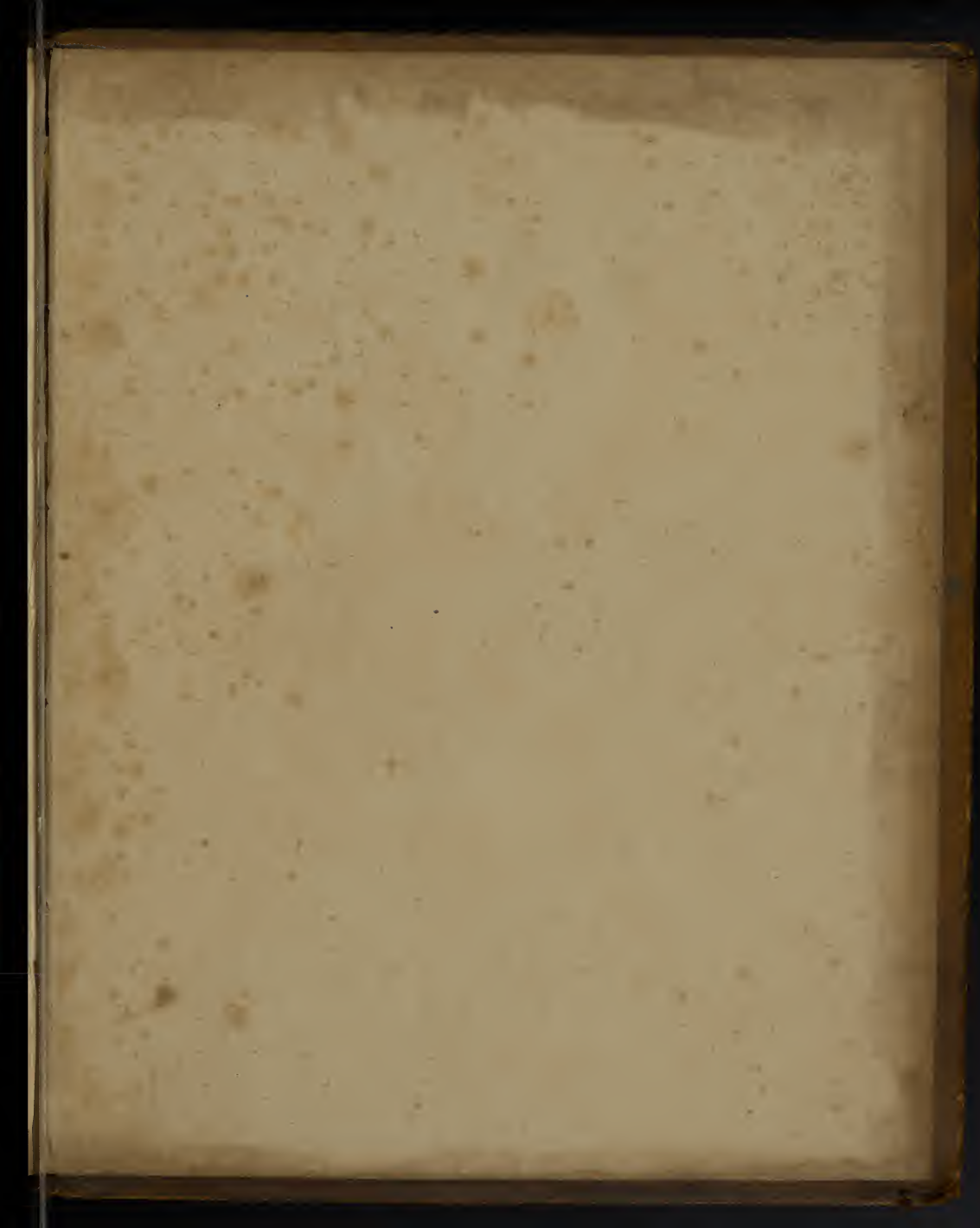
The Little opinion seems to be that a
Master may justify a battery in defence
of his Servant - that is the opinion of Jus-
tic Blackstone and others. //

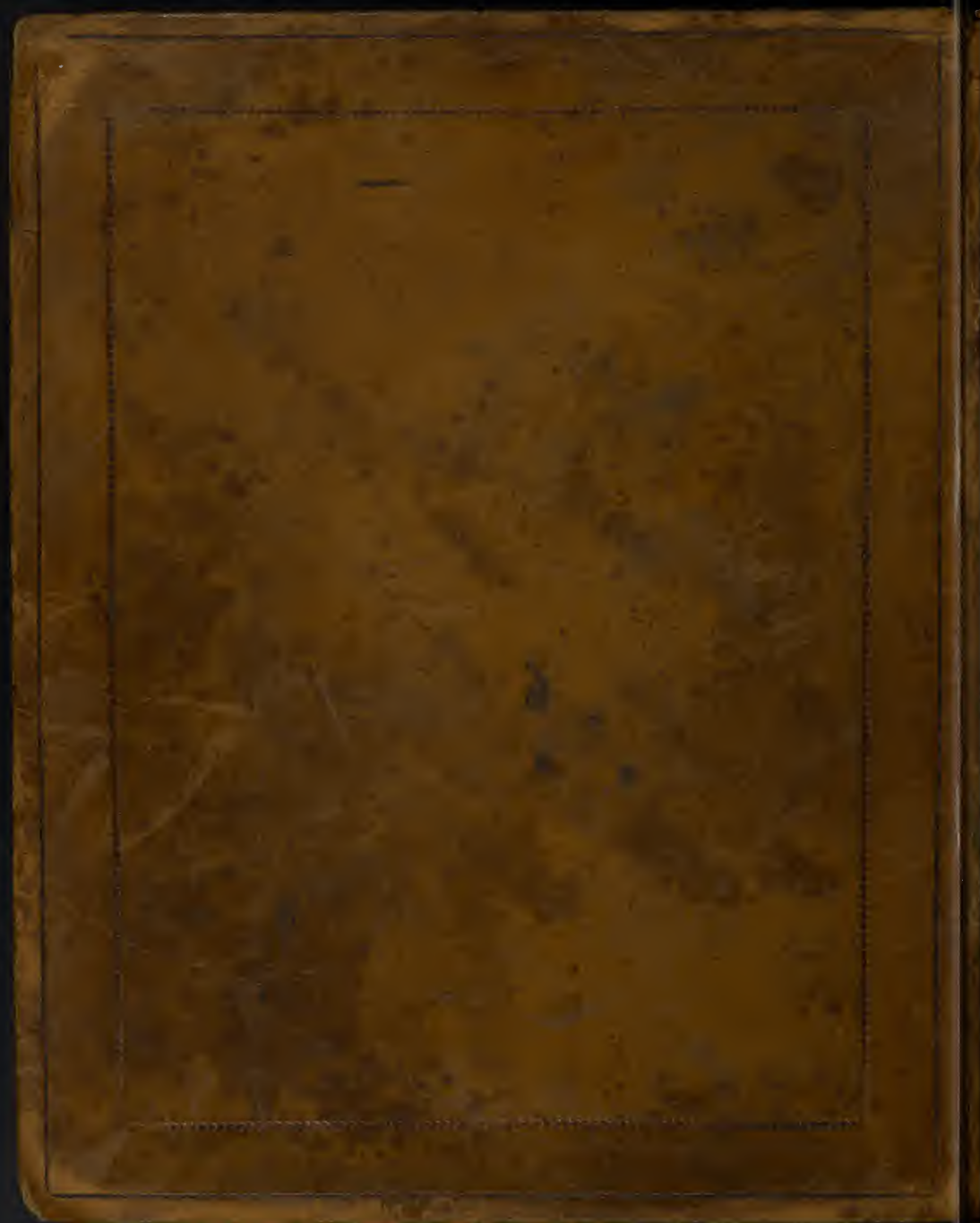
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REEVES
&
GOULED'S
LECTURES

VOLUME
1

N. M.